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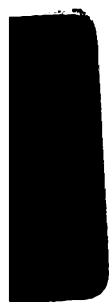
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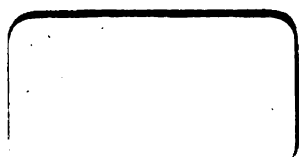




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THE

EXCHEQUER REPORTS.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

Courts of Exchequer & Exchequer Chamber.

VOL. XI.

EASTER TERM, 18 VICT., TO HILARY VACATION, 19 VICT.,
BOTH INCLUSIVE

BY

E. T. HURLSTONE, OF THE INNER TEMPLE,

AND

J. GORDON, OF THE MIDDLE TEMPLE,

ESQUIRES, BARRISTERS-AT-LAW.

LONDON:

S. SWEET, W. MAXWELL, AND V. & R. STEVENS & G. S. NORTON,

Law Booksellers and Publishers.

HODGES & SMITH, GRAFTON STREET, DUBLIN.

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DURING THE PERIOD COMPRISED IN THIS VOLUME.

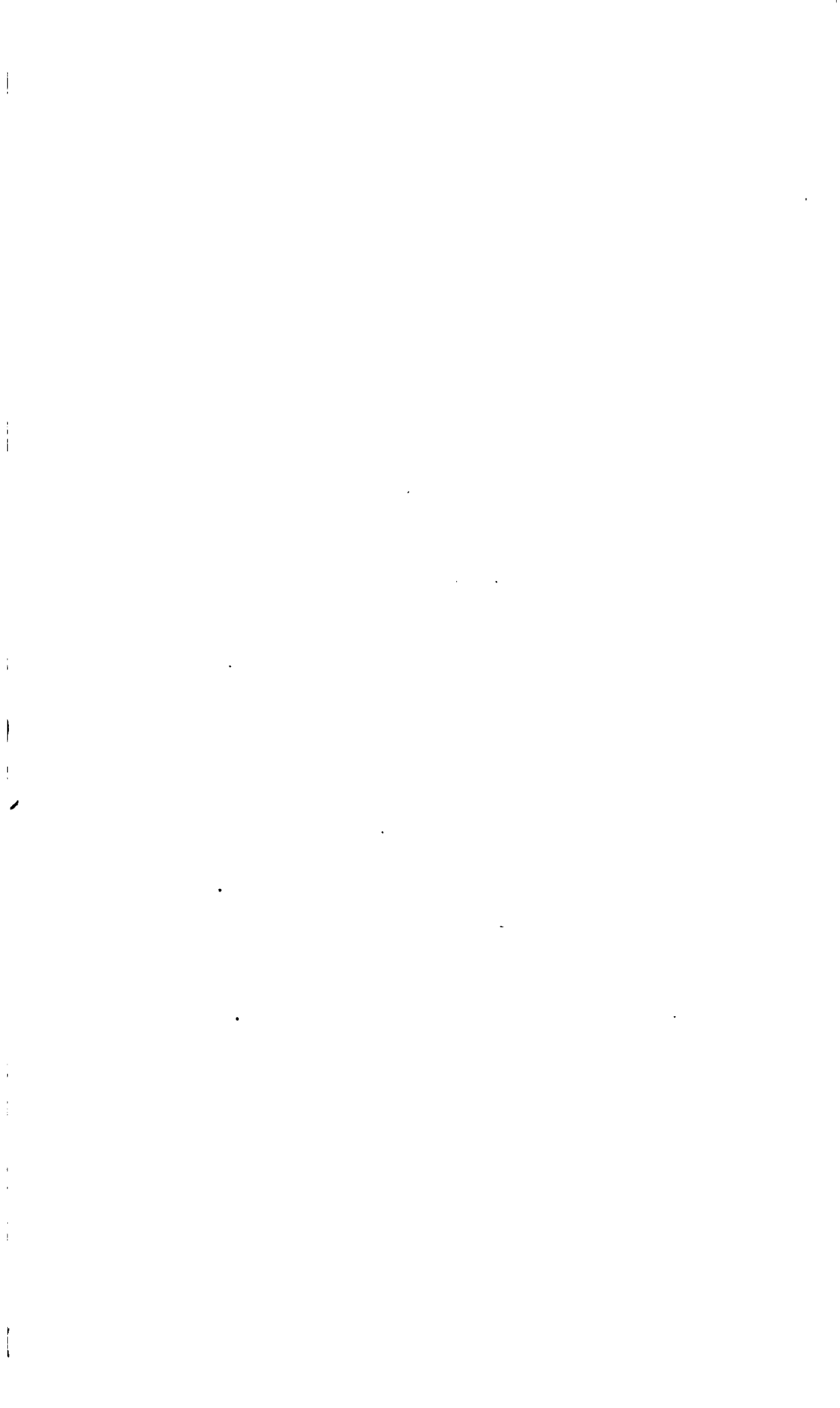
The Right Honourable Sir FREDERICK POLLOCK, Knt, Chief Baron.

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ERRATA.

Page 40, marginal note, line 15, for the trial read that trial.
 „ 386, line 2 from the bottom, for Knowles read Temple.

Exchequer Reports.

EASTER TERM, 18 VICT.

1855.

April 17.

TAYLOR v. THE CROWLAND GAS AND COKE COMPANY.

THIS was a rule calling on the defendants to shew cause why the Master should not tax the plaintiff's costs of this action, and why he should not recover the same, notwithstanding the sum recovered was under 20*l.*, pursuant to the 15 & 16 Vict. c. 54, s. 4.

The defendants were a joint stock company completely registered under the 7 & 8 Vict. c. 110, and the plaintiff obtained a verdict against them for 7*l.* (a), for salary due to him as secretary to the company. The affidavit in support of the application stated that, at the time of action brought, the plaintiff resided and carried on his business at Crowland, in the county of Lincoln, and within the jurisdiction

A corporation is liable to be sued in a county court.

A corporation "*dwells*," within the meaning of the 9 & 10 Vict. c. 95, s. 123, at the place where its business is carried on.

Therefore, where a joint-stock company completely registered carried on its business within twenty miles

of the place, and within the jurisdiction of the county court, where the plaintiff resided, but several of the shareholders dwelt beyond that distance and out of such jurisdiction:—*Held*, that the superior Court had not concurrent jurisdiction with the county court.

Seemle, that the 7 & 8 Vict. c. 110, s. 68, which enables the Court or a Judge to allow execution to issue against the shareholders of a joint-stock company, does not apply to a plaintiff in a county court.

Also, that where, in an action against a joint-stock company in a superior Court, not having concurrent jurisdiction with a county court, it appears, that, if the plaintiff had sued in the county court, he could not have obtained satisfaction from the property of the company, and that the shareholders reside out of the jurisdiction of the county court, that would afford sufficient ground for giving the plaintiff costs under the 15 & 16 Vict. c. 54, s. 4.

(a) See the case, 10 Exch. 288, 293.

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of the Crowland county court, but at a distance of more than twenty miles from several of the shareholders of the company; and that none of such shareholders resided within the jurisdiction of that county court. The affidavit in answer stated, that the company was formed for the purpose of supplying the town of Crowland with gas, and was managed by five directors, who all resided at Crowland; and that the business of the company was carried on at Crowland, as required by their deed of settlement.

Watson and Digby Seymour shewed cause.—First, a corporation is subject to the jurisdiction of the county court. At common law a corporation might sue or be sued in a county court. The 9 & 10 Vict. c. 95 recites, "that the county court is a court of ancient jurisdiction, having cognisance of all pleas of personal actions to any amount, by virtue of a writ of justices in that behalf." Section 3 enacts, "that every court holden under that Act, shall have all the jurisdiction and powers of the county court for the recovery of debts and demands as altered by that Act, throughout the district for which it is holden." By the interpretation clause (sect. 142), "the word 'person' shall be understood to mean a body politic, corporate, or collegiate, as well as an individual." The 48th rule of practice (a), made in pursuance of the 12 & 13 Vict. c. 101, s. 12, prescribes the mode of effecting service of a summons upon a corporation. The 9 & 10 Vict. c. 95 contains no exception as to corporations. The 67th section enacts, "that no privilege, except as hereinafter excepted, shall be allowed to any person, to exempt him from the jurisdiction of any court holden under this Act." The 140th and 142nd sections contain an exception with respect to the Universities of Oxford and Cambridge, and the Stannaries Courts. The case of the *North Western Railway Company v. Whinray* (b), is an instance of a corporation being sued in a county court.

(a) Pollock's C. C. Prac. p. 80.

(b) 10 Exch. 77.

Secondly, this is not a case in which the plaintiff had the option of suing in the county court or the superior Court. By the 9 & 10 Vict. c. 95, s. 58, and 13 & 14 Vict. c. 61, s. 1, the county court has jurisdiction (with certain exceptions) in all personal actions, where the debt or damage claimed does not exceed 50*l*. The 128th section of the 9 & 10 Vict. c. 95, enables the plaintiff, at his election, to sue in the superior Court or the county court in three cases: first, where he dwells more than twenty miles from the defendant; secondly, where the cause of action did not arise wholly, or in some material part, within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of action brought; and thirdly, where any officer of the court shall be a party. Then, by the 129th section, if any action shall be commenced in any superior Court, "for any cause other than those lastly hereinbefore specified, for which a plaint might have been entered in any court holden under this Act," and a verdict be entered for the plaintiff for less than 20*l*. in an action of contract, the plaintiff shall recover no costs. This case does not fall within either of the exceptions mentioned in the 128th section. The cause of action arose within the jurisdiction of the county court, and the defendants dwell within twenty miles of the plaintiff; for a corporation dwells at the place where it carries on its business. For the purpose of suing and being sued, it must be considered as an individual. The plaintiff relies on the 7 & 8 Vict. c. 110, s. 66, which provides, that if the property of the company is insufficient to satisfy the judgment, execution may issue—first, against the shareholders for the time being, then against the shareholders at the time of the contract or the judgment; and it is said, that the plaintiff could not avail himself of that remedy, since some of the shareholders did not reside within the jurisdiction of the county court. But the affidavits are defective in that respect, inasmuch as they do not shew where the shareholders resided at the time of the contract

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or the judgment, but only at the time of action brought. By the 36th section of the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16), execution may issue against the shareholders to the extent of their shares; and, for aught that appears, the plaintiff might have pursued that remedy in the county court.

Montagu Chambers and Tapping in support of the rule. —Actions against a joint stock company are not within the enactments which deprive a plaintiff of costs. In such cases the superior Courts have a concurrent jurisdiction with the county courts. As a general principle, the party who seeks to deprive another of his right to sue in a superior Court, must establish that the latter was bound to resort to the inferior court. In this case the plaintiff could not obtain ample justice in a county court. The 3rd section of the 9 & 10 Vict. c. 95, limits the jurisdiction of those courts to the district for which they are holden. They cannot issue execution either against the person or goods beyond that limit. The 4th section merely contemplates the case of an ancient county court still existing. But those courts could not issue execution beyond their jurisdiction: Com. Dig. "Execution" (I. 2). The 104th section provides for the case of a defendant who removes out of the jurisdiction of the court, in order to avoid execution. The plaintiff has a right to sue all the shareholders in the company; and if, as in this case, some of them reside out of the jurisdiction of the county court, or more than twenty miles from the plaintiff, he may, at his election, sue either in the superior Court or the county court. The case is similar to that of the office of sheriff of Middlesex, which is executed by two persons, and with respect to which it has been held, that, unless they both reside within the jurisdiction of a county court, the superior Courts have concurrent jurisdiction: *Doyle v. Lawrence* (a). So, in the case of an action

(a) 2 L. M. & P. 368.

against husband and wife; it is not sufficient to shew that the husband alone resides within the jurisdiction of a county court: *Parry v. Davis* (a). Moreover, if the plaintiff sued in the county court, he could not have the benefit of the remedy provided by the 7 & 8 Vict. c. 110, s. 68. The power given by that section to issue execution against the shareholders of the company, cannot be exercised by a county court. The term, "by leave of the Court or a Judge," refers solely to the superior Courts. But, even if that enactment applies to a county court, the plaintiff could not have the full benefit of the remedy, since some of the shareholders reside beyond the jurisdiction. That circumstance is sufficient to warrant this Court in acting under the 15 & 16 Vict. c. 54, s. 4, which enables the Court or a Judge to give costs, if it appears, to their satisfaction, that there was sufficient reason for bringing the action in the superior Court.

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POLLOCK, C. B.—We are all of opinion that the rule ought to be discharged. The defendants are a Joint Stock Company completely registered under the 7 & 8 Vict. c. 110, and are therefore, for certain purposes, a corporation, and entitled to sue and be sued as such. I am of opinion that the jurisdiction of the county courts extends to the case of any corporation or quasi corporation. The 142nd section of the 9 & 10 Vict. c. 95, proves that. But it is not necessary to resort to the explanatory clause, because the 58th section, which creates the jurisdiction of the county courts, says "that all pleas of personal actions," &c., may be holden in the county court. That includes actions against a corporation or a quasi corporation as well as actions against an individual. Therefore, it is clear that this action might have been brought in the county court. Then what is the consequence of its having been brought in the superior

(a) 1 L. M. & P. 379.

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Court, the sum recovered being under 20*l*.? That depends on the 128th and 129th sections of the 9 & 10 Vict. c. 95. The 129th section says, "that if any action shall be commenced, after the passing of this Act, in any of her Majesty's superior Courts of record for any cause other than those lastly hereinbefore specified, for which a plaint might have been entered in any Court holden under this Act,"—it is clear that a plaint might have been entered in the county court for this claim—"and a verdict shall be found for the plaintiff for a sum less than twenty pounds if the said action is founded on contract, or less than five pounds if it be founded on tort, the said plaintiff shall have judgment to recover such sum only and no costs." Then is this a plaint "for any cause other than those lastly hereinbefore specified," that is, those specified in the 128th section? Now the contention on the part of the plaintiff is, that he has a right to bring this action in the superior Court because he dwells more than twenty miles from the defendant. Unless his case is put on that ground, I do not see on what ground it can be put, because it is clear that the cause of action arose within the jurisdiction of the county court. Now, if a corporation does not dwell anywhere, these defendants did not dwell more than twenty miles from the plaintiff, and consequently the case is not within the exception. But the common sense and plain meaning of the Act is, that a corporation is to be considered as dwelling at the place where it carries on its business. It is true that the 128th section uses the words "dwells or carries on his business," but probably the two expressions have found their way into the Act through that incuria which sometimes creeps into the framing of Acts of Parliament, for I do not think that any distinction was intended between the word "dwells" in the former part of the section, and the words "dwell or carries on his business" in the latter part. But, at all events, it was never intended that the clause should apply so as to except all corporations or quasi cor-

porations from the protection which the statute meant to afford to all persons sued; for if we were to decide that the rule ought to be absolute, every corporation liable to be sued for forty shillings and one farthing might be sued in the superior Courts at Westminster, and subjected to the increased costs occasioned by such proceeding. The expense, delay, and inconvenience which the legislature intended to remedy are the same in the case of a corporation being sued as in that of an individual; and unless we are compelled to come to a different conclusion, we ought to decide that the County Court Acts intended to protect corporations as well as individuals from being sued in the superior Courts. With regard to the difficulty of applying the 68th section of the 7 & 8 Vict. c. 110, which enables execution to be issued against shareholders and persons who have been shareholders at a certain period, I very much doubt whether that enactment was ever intended to apply to such small matters as would be the subject of a suit in a county court, but to those only which are the subject of a suit in the superior Courts. It is not necessary, however, to go at length into that part of the argument; it is sufficient to say that this action, though against a corporation, might have been brought in the county court; that the plaintiff has recovered less than 20*l.*, and that he does not dwell more than twenty miles from the defendants: for if it be true that the defendants, being a corporation, dwell nowhere, it cannot be predicated that they dwell more than twenty miles from the plaintiff, and if the defendants be considered as dwelling where they carry on their business, it is not shewn that the plaintiff dwells more than twenty miles from them.

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PARKE, B.—I am of the same opinion. It is argued, first, that no action lies against a corporation in a county court. But at common law such an action would lie; for the corporation might have goods within the county and

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the process would be by distress infinite. At common law all that was necessary was, that the cause of action arose within the county, and there were some means of bringing the defendant to answer in the Court. It is said in Com. Dig. "County Court" (C. 8), that "an action cannot be brought in the county court, even for a less sum than forty shillings, unless both the defendant reside and the cause of action arise within the county;" and some cases are cited where application was made to stay proceedings on the ground that the remedy was in the county court. But it was held, that, in order to create that remedy, there must be not only a cause of action, but the *means of enforcing it*, within the county;—and that is all that is meant by the passage. However, if there be any question about that, it is perfectly clear, that, under the 9 & 10 Vict. c. 95, a corporation is liable to be sued in a county court. The interpretation clause shews that the word "person" means "corporation," and that has been carried into effect by the rule which directs in what manner service is to be made on a corporation. It is, therefore, perfectly clear that the county court has jurisdiction over this quasi corporation. Then it is said, that, in this particular case, the superior Court had concurrent jurisdiction with the county court. By the 58th section, all pleas of personal actions, where the debt or damage does not exceed a certain amount, may be holden in the county court with certain specified exceptions. Therefore there is a general jurisdiction under that clause. Then come the 128th and 129th sections, upon which I have very little to add to what my Lord has already said. The 129th section deprives the plaintiff of costs where he has brought his action in the superior Court "for any cause other than those *lastly* hereinbefore specified." Now, three classes of cases are mentioned before, and the last antecedent is, "where any officer of the county court shall be a party;" but the exception refers to all, and consequently the restriction does not apply where the plaintiff

dwells more than twenty miles from the defendant. In this case, the defendants, who are a corporation, must be considered as dwelling within twenty miles of the plaintiff, or if not the exception does not apply to such a case. However, I am disposed to be of the opinion of the Lord Chief Baron, that a corporation must be considered as dwelling at the place where its business is carried on. The other case is, "where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of action brought." Here the affidavits do not shew that the cause of action did not arise where the defendants carry on their business, and consequently the 129th section applies. Then it is said, that, if the plaintiff sued in the county court, he could not have the benefit given by the 7 & 8 Vict. c. 110, ss. 66, 68, of obtaining satisfaction of his judgment by proceeding, not merely against the property of the company, but also against the individual shareholders. There can be no doubt that a county court has no power to carry into effect that enactment; and if the plaintiff had brought himself within it, he might have made out a good case for the Court to exercise its jurisdiction under the 4th section of the 15 & 16 Vict. c. 54, which enables them to give costs, if they are satisfied that there was sufficient reason for bringing the action in the superior Court. But the plaintiff ought to lay sufficient ground for the exercise of that jurisdiction. If he had shewn that there were no means of obtaining satisfaction of the judgment from the corporation funds, and that he was under the necessity of resorting to members of the company who dwelt out of the jurisdiction of the county court, that would have afforded ground for special relief. But the affidavits do not disclose any available remedy which could be pursued against the shareholders under that Act—they do not say that the corporation is unable to pay 7*l.* 1*s.* As regards the clause which gives

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concurrent jurisdiction, the case does not fall within it; and as to special relief, the affidavits are wholly defective in shewing any ground upon which the Court can grant it.

PLATT, B.—I am of the same opinion. The 142nd section of the 9 & 10 Vict. c. 95, puts an end to the question whether a corporation is liable to be sued in a county court, for it expressly declares that the word "person" shall include "corporation;" and then there is a rule which prescribed the mode in which service of the summons is to be effected on a corporation, and which shews that, if they carry on business within the jurisdiction of a county court, that is the place where they "dwell" for the purposes of that Act. Therefore the 58th section of the 9 & 10 Vict. c. 95, applies as well to corporations as individuals. The next question is, whether the plaintiff has made out that this is a case of concurrent jurisdiction. By the 128th section of that Act, certain cases are defined in which the Court or a Judge may give costs; and to those some others are added by the 15 & 16 Vict. c. 54, s. 4. Now it is clear that this case does not fall within the former Act, and the question is, whether it falls within the latter, which enables the Court or a Judge to give costs if the plaintiff shall make it appear to their satisfaction that there was sufficient reason for bringing the action in the superior Court. Here no sufficient reason is shewn. It does not appear that the defendants, who are a corporation, are unable to pay the amount recovered. In the absence of any suggestion that their goods are insufficient to satisfy the amount recovered, it must be taken for granted that the fruits of the judgment may be obtained from them. That being so, this is not a case in which the Court can give relief under the 15 & 16 Vict. c. 54, s. 4. For these reasons I concur in opinion that the rule ought to be discharged.

MARTIN, B.—I also think that the rule ought to be dis-

charged. It is perfectly plain that a county court has jurisdiction over a corporation. We have had several appeals from county courts in which corporations were parties, and it never occurred to any one that the county court had no jurisdiction. It would, indeed, be unfortunate if a plaintiff was entitled to costs when a corporation was defendant, and not when an individual was defendant; for there would be one law in the case of a corporation, and another in that of an individual. In my judgment, no such conclusion can be drawn from the language of the County Courts Act. The 129th section of the 9 & 10 Vict. c. 95, says, that, if in an action in a superior Court the plaintiff shall recover no more than 20*l.* in contract, and 5*l.* in tort, he "*shall have judgment to recover such sum only, and no costs;*" and the same language is used in the 11th section of the 13 & 14 Vict. c. 61. Those are general enactments. This is an action in a superior Court, in which the plaintiff has recovered less than 20*l.*; and therefore, unless the above enactments have been altered, he is clearly not entitled to costs. But, it is said, that the plaintiff is entitled by reason of the 4th section of the 15 & 16 Vict. c. 54, which says, that, "if the plaintiff shall make it appear to the satisfaction of the Court in which such action was brought, or to the satisfaction of a Judge at Chambers, upon summons, that such action was brought for a cause in which concurrent jurisdiction is given to the superior Courts by the 128th section of the 9 & 10 Vict. c. 95, or for which no plaint could have been entered in any such county courts; or that such action was removed from a county court by certiorari; or that there was sufficient reason for bringing such action in the Court in which such action was brought, then and in any of such cases the Court in which such action is brought, or the Judge at Chambers, shall thereupon, by rule or order, direct that the plaintiff shall recover his costs," &c. Does this case fall within any part of that section? The 128th section of the 9 & 10 Vict. c. 95, enacts,

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that, in certain specified cases, actions "may be brought and determined in any such superior Court, at the election of the party suing or proceeding, as if that Act had not been passed. One of these cases is, "where the plaintiff dwells more than twenty miles from the defendant." Then, do these defendants dwell more than twenty miles from the plaintiff? I agree with the Lord Chief Baron, and my Brother *Parke*, that "dwells" must be taken to be the place where the corporation carries on its business; if not, the case is altogether out of the statute. The next is, "where the cause of action did not arise wholly or in some material part within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of action brought." Here it did arise within that district. Therefore, this is not a cause of action in which concurrent jurisdiction is given to the superior Courts by the 128th section. Then, is it a case in which the plaintiff is entitled to relief under the 4th section of the 15 & 16 Vict. c. 54, which enables the Court to give costs, if they are satisfied that there was sufficient reason for bringing the action in the superior Court? That seems to me the strongest ground for making the application; but, then, I agree that we cannot go into a speculation, whether the company have effects to satisfy the plaintiff's judgment: it was the duty of the plaintiff to shew that they have not; and as he has not done so, there is no reason to suppose that he could not have obtained satisfaction of his judgment from the effects of the company; and, consequently, no reason is shewn for bringing the action in this Court.

Rule discharged.

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LEA v. ROSSL

April 19.

IN this case judgment was signed against the defendant on the 21st of December, 1855, and a writ of fieri facias issued, directed to the Sheriff of Middlesex, who, on the 22nd and 23rd, made several ineffectual attempts to levy on the defendant's goods. Before the judgment, the defendant had assigned his goods by bill of sale to one Wood, as a security for 200*l.*, and Wood claimed them under that assignment. In January, 1855, the defendant petitioned the Insolvent Debtors Court, and the usual order was made vesting his estate and effects in the provisional assignee of that Court, who thereupon took possession of the goods for the benefit of the creditors. The sheriff then obtained an interpleader summons, upon which Wood did not appear; and *Platt*, B., before whom the summons was heard, made an order barring Wood's claim and that of the provisional assignee, and directing the sheriff to proceed with the execution.

The Court or a Judge has jurisdiction to make an interpleader order, on the application of a sheriff *intending* to seize goods, though before actual seizure; but such jurisdiction will be rarely exercised.

H. Bullar now moved, on behalf of the provisional assignee, to rescind the order of *Platt*, B.—The Court or a Judge has no jurisdiction to make an interpleader order under the 1 & 2 Will. 4, c. 58, s. 6, unless the sheriff has actually seized the goods of the judgment debtor. [*Parke*, B.—The words of the section are, “when any such claim shall be made to any goods or chattels taken or *intended* to be taken in execution.”] That must be read in connection with the 1st section, by which it must appear, that the applicant “is ready to bring into Court or to pay or dispose of the subject-matter of the action in such manner as the Court (or a Judge thereof) may order or direct.” That shews the intention of the legislature, that the sheriff

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should not obtain relief unless he had a disposing power over the goods. *Holton v. Guntrip* (a) decided, that the sheriff is not entitled to relief where, having gone to the premises of the defendant to levy under a *fi. fa.*, he has withdrawn without seizing the defendant's goods on notice of an adverse claim. *Alderson, B.*, there says:—"There is no instance of an interpleader where the sheriff had not possession of the goods, and was therefore unable to deliver them to one party or the other." [*Parke, B.*—In that case, as observed by Lord *Abinger*, the sheriff did not come to the Court intending to take the goods, for he abandoned them.] In *Anderson v. Calloway* (b) Lord *Lyndhurst, C. B.*, says:—"The object of the Act of Parliament was to afford relief to the sheriff where two parties were claiming the property, and he had either the goods or the money in his possession; not to a case where he had paid over the money to one of the parties." *Braine v. Hunt* (c) decided, that the sheriff is not entitled to relief where he has delivered up any part of the goods to the claimant. [*Platt, B.*—In those cases the sheriff had seized the goods.] In *Scott v. Lewis* (d), Lord *Abinger, C. B.*, says:—"I think the Act implies that the goods or money must be in the hands of the sheriff at the time of his application to the Court." [*Parke, B.*—That must be understood with reference to the facts of the case: it means, that, if the sheriff has seized the goods, they or their proceeds must be in his hands at the time he applies for the interpleader order; and that if he does not choose to retain them, he has no right to apply.] In 2 Chit. Arch. 1222, it is stated, that the sheriff must have possession of the goods.

PARKE, B.—It is perfectly clear, that, in this case, my Brother *Platt* had jurisdiction to make the order. The

(a) 3 M. & W. 145.

(b) 1 C. & M. 182.

(c) 2 C. & M. 418.

(d) 2 Cr. M. & R. 289.

statute, in express terms, says, that the sheriff may apply for relief where the goods are taken or intended to be taken in execution. In all the cases cited, the sheriff had either withdrawn or given up the goods. There is no doubt about the jurisdiction, though, probably, it will be very rarely exercised.

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MARTIN, B.—It may be that the property is of such a nature that it might be injured by seizure; in which case the sheriff would be right in applying for the order before seizure. I do not think that, in all cases, a Judge would interfere if the sheriff had not seized, but cases might arise in which great injustice would be done if he did not.

Rule refused.

YATES and Others v. DUNSTER.

April 26.

THE declaration stated, that the plaintiffs were possessed of a messuage and premises for the residue of a term of nine years, created by a lease, in and by which the lessees covenanted for themselves and their assigns well and substantially to repair the messuage and premises during the term, and which lease had legally come to and vested in the plaintiffs by assignment, and they then were and still are assignees of the same; of all which premises the defendant had notice; and thereupon the plaintiffs demised to the

The plaintiff, being assignee of a lease which contained a covenant to repair, underlet the premises to the defendant, upon the terms, that he should "maintain them in as good a state as they would be when repaired by

him." Shortly after the defendant took possession, the premises, which were old and dilapidated, were destroyed by fire. The jury found that the cost of rebuilding them would be 1635*l*, but that they would be more valuable by 600*l*.:—*Held*, that the defendant was only bound to put the premises in the same state they would have been if he had repaired them before the fire, and consequently he was liable to pay as damages 1035*l* only.

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defendant, and the defendant became tenant to the plaintiffs of the said messuage and premises, upon certain terms contained in certain letters written and delivered by the defendant to the plaintiffs, and by the plaintiffs to the defendant.—The declaration then set out the following letter from the defendant to the plaintiffs:—"48, Upper Thames Street, London, 12th December, 1853.—Messrs. Yates & Co.—Gentlemen,—I hereby engage to become your tenant of the warehouse and small dwellinghouse, No. 200, Upper Thames Street and Bread Street Hill, for the period of fifteen months from this date, and to pay you the annual rental of 110*l.* quarterly, the first quarter to become due on the 25th March, 1854, and the last, 10th March, 1855, on which date I promise to give up possession to you; and further, to pay insurance on the premises and all rates and taxes from Christmas next. In making this tender, I beg you distinctly to understand, that, at the expiration of your term of lease with the parish of St. Giles without Cripple-gate, I am to be held harmless by you from any claim they may make for dilapidations made by you up to the present time; but I agree to maintain the premises in as good state as they will be when the agreed repairs by me are done."—The declaration then set out a letter from the plaintiffs to the defendant accepting those terms, and averred that the defendant had become tenant to the plaintiffs on those terms, and that the plaintiffs had done all things necessary, &c. to entitle the plaintiffs to have the messuage and premises kept and maintained in such repair as the defendant had agreed to keep the same.—Breach: non-repair.

Pleas:—First, that the defendant did not become tenant, modo et forma: Secondly, that the defendant did repair:—Upon which, issues were joined.

At the trial, before *Pollock*, C. B., at the London Sittings after last Michaelmas Term, it appeared that the plaintiffs were assignees, for the residue of a term of nine years, of a

lease of a warehouse and dwelling-house in Upper Thames Street. The lease contained the usual covenant on the part of the lessees to keep the premises in repair during the term. The plaintiffs let the premises to the defendant on the terms contained in the letter of the 12th of December, 1853, set out in the declaration. Shortly after the tenancy commenced, the premises were accidentally destroyed by fire. At the time the defendant took the premises, they were old and dilapidated; and it appeared in evidence that the cost of rebuilding them would be 1635*l.*, but that, when rebuilt, they would be more valuable by 600*l.* than if they had been repaired before the fire. An expense of 84*l.* had been incurred in putting up a hoarding, &c. by order of the district surveyor. The defendant had insured the premises for 1000*l.*

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The learned Judge left it to the jury to say, first, what would be the cost of restoring the premises to the state in which the defendant undertook to place them; and secondly, what was the plaintiffs' loss from the destruction of the premises. The jury found that it would cost 1635*l.* to rebuild the premises, but that 600*l.* ought to be deducted if the defendant was bound to make good the plaintiffs' loss only, since the restoration would give them new premises for old. A verdict was accordingly entered for the plaintiffs, with 1719*l.* damages (the 1635*l.* and 84*l.*); and leave was reserved to the defendant to move to reduce the damages by 1000*l.*, the amount of the insurance, and the 600*l.*

Bramwell, in last Hilary Term, obtained a rule nisi accordingly; against which

Phipson now shewed cause.—The only question is, whether the plaintiffs are entitled to recover, as damages, the amount which it would cost to rebuild the premises, or whether the defendant has a right to deduct 600*l.*, the increased value of the premises when rebuilt. [*Martin*, B.—

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The defendant is liable for the amount of the repairs, and for the value of the premises in the state in which they were at the time they were destroyed.] The defendant undertook to put the premises in repair, and therefore the measure of damages is the cost of their restoration. It is immaterial, that they cannot be restored without being made more valuable; in the ordinary case of dilapidation, it is difficult to repair the premises without making them in some measure better. [*Parke, B.*—In *The Duke of Newcastle v. The Hundred of Broxtowe* (a), it was held, that, in assessing compensation for the demolition of a dwelling-house under the 7 & 8 Geo. 4, c. 31, the jury ought to consider what sum will be necessary to repair the injury and replace the house in the state in which it was at the time when the outrage was committed, and not whether the plaintiff was likely to make it his residence, or whether it was suitable for such residence. And in *Vivian v. Champion* (b), Lord Holt, C. J., says, "If the premises were out of repair in the ancestor's time, yet if the lessee suffers them to continue out of repair in the time of the heir, that is a damage to the heir; and he shall have an action. And, in these actions, there ought to be very good damages; and it has been always practised so before me, and everybody else, that I ever knew. We always inquire in these cases, what it will cost to put the premises in repair, and give so much damages; and the plaintiff ought, in justice, to apply the damages to the repair of the premises." Here the defendant is only bound to put the premises in the same state as they would have been, if he had repaired them at the time he took them.] It is impossible to restore them without making them better; and the defendant, who is a wrongdoer, is responsible for all the consequences of his default.

Willes appeared in support of the rule; but was not called upon to argue.

(a) 4 B. & Ad. 273.

(b) 2 Ld. Raym. 1125.

PER CURIAM (a).—The rule must be absolute to reduce the damages, by deducting from the amount for which the verdict was entered the 600*l.* and 1000*l.* The verdict will therefore stand for 119*l.*

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Rule absolute accordingly.

(a) *Pollock, C. B., Parks, B., Alderson, B., and Martin, B.*

BARNETT, an Infant, by J. BARNETT his next Friend, v. THE EARL OF GUILDFORD. April 21.

TRESPASS for breaking and entering certain land of the plaintiff at Great Easton, in the county of Leicester, and taking the grass and crops growing thereon &c., and expelling the plaintiff from the possession thereof for a long time, during all which he was prevented from taking the issues and profits thereof.

Pleas:—First, that the land in which &c., was the close, soil, and freehold of the said Earl; wherefore he in his own right, at the several times when &c., committed therein the supposed trespasses.—Secondly, not guilty.—Thirdly, that the said land and other matters were not the plaintiff's, as alleged.

Replication to first plea:—That the said land, from time immemorial, hath been and still is copyhold, parcel of the manor of Great Easton, in the county of Leicester, and a customary tenement of that manor, demised and demiseable by copy of court roll of the manor, by the lord of the manor, or by his steward of the court of the manor for the time

The customary heir of a copyhold tenement cannot maintain trespass without entry; but after entry there is a relation back to the actual title, as against a wrongdoer, and he may maintain an action for trespasses committed prior to his entry.

Seemle, that the rule of law, that the title of an administrator has relation to the death of the intestate, so as to enable him to recover for injury to per-

sonal chattels prior to the grant of administration, applies also to leasehold property, but in that case he must first enter.

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being, to any person or persons willing to take the same in fee simple, or otherwise, at the will of the lord of the manor, according to the custom of the manor; and that the said Earl was, before and at the said times when &c., the lord of the manor; and that the said land was his close, soil, and freehold as such lord: and that, long before the said times when &c., the said Earl then being lord of the manor, at his court baron, holden in and for the manor, before his steward of the manor for the time being, by copy of the court roll of the manor, granted to Elizabeth Muggleton the said land in which &c.: To hold to her, her heirs and assigns, for ever, by copy of the court roll of the manor, at the will of the lord of the manor, according to the custom of the manor: By virtue of which grant, the said Elizabeth afterwards, and before the said times when &c., entered into the said land in which &c., and became and was seised thereof in her demesne as of fee, at the will of the lord of the manor, according to the custom of the manor, and continued so thereof seised until she afterwards, and before any of the said times when &c., having married Joseph Barnett, died so seised thereof, leaving the plaintiff, her eldest son and customary heir, an infant, her surviving; and upon the death of the said Elizabeth, the plaintiff, by the custom of the manor, became and was seised in his demesne, as of fee, of the said land in which &c., at the will of the lord of the manor, according to the custom of the manor. And the plaintiff afterwards, and before any of the said times when &c., duly appeared at a court baron of the said Earl, then being lord of the manor, held in and for the manor before his then steward of the manor, according to the custom of the manor, and then duly requested the said Earl, by his said steward, to admit him tenant of the said land in which &c., and then duly made good his claim to be admitted tenant thereof, and was then ready and willing and offered to pay to the said steward the proper and customary fines and fees payable on such admis-

sion, of all which the said Earl and his steward then had due notice; but the said Earl, so being lord of the manor, by his said steward in that behalf, then wholly and absolutely refused to admit the plaintiff as tenant of the said land. Whereupon the plaintiff entered the said land in which &c., as he lawfully might for the cause aforesaid, and became and was seised and possessed thereof in his demesne as of fee at the will of the lord of the manor, according to the custom of the manor, and continued so thereof seised and possessed until and at the said times when, &c. And the said Earl, after the said refusal and after the plaintiff had so become and whilst he was so seised and possessed thereof as aforesaid, and of his own wrong, committed the trespasses complained of.

The plaintiff joined issue on the other pleas.

Rejoinder to replication to first plea.—That the defendant was lord of the manor until and at the said times when &c., and that the plaintiff was not ready and willing and did not offer to pay to the said steward the proper and customary fines and fees payable on such admission as alleged.—Upon which issue was joined.

At the trial, before *Maule, J.*, at the Leicestershire Summer Assizes, 1854, the following facts appeared:—The plaintiff was the only son and customary heir of Elizabeth Muggleton, who at the time of her marriage with Joseph Barnett, the plaintiff's father, was seised in fee of the land in question, which was copyhold of the manor of Great Easton in Leicestershire. The defendant was lord of that manor. The plaintiff's mother died in December, 1838, so seised of the land in question, the plaintiff being then an infant of the age of two years. On her death (there being no tenancy by the curtesy in the manor), the plaintiff became entitled as her heir, and his father entered upon the land on his behalf, and continued to hold it until the defendant seized quousque. In January, 1852, the defendant brought an action of ejectment, which was undefended, and in

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March, 1852, the sheriff executed a writ of possession. The defendant then let the land to one Rhodes. In October, 1852, the plaintiff's father attended a manor court and demanded the admission of his son, and at the same time tendered the amount of the fine and fees; but the steward refused to admit him unless the costs of the ejectment were also paid. An action was afterwards brought for these costs, and they were paid into court. In July, 1853, the plaintiff's father paid the fine and fees and demanded from Rhodes, the tenant, possession of the land, which was refused. In the following November he was admitted as guardian of the plaintiff, and entered into possession. Rhodes, during his occupation, had done great injury to the land.

Under these circumstances, it was submitted on behalf of the defendant, that the plaintiff had not at any time, as against the lord, such a possession as to enable him to maintain trespass. On behalf of the defendant it was contended, that the tender and refusal of the fine and fees rendered the subsequent possession of the lord unlawful. The learned Judge was of opinion, that the plaintiff was entitled to recover in respect of the wrongful occupation by the lord between the periods of July and November; but his Lordship left it to the jury to say whether, in point of fact, there had been an entry prior to the admittance, and the jury found in the negative. The verdict was then entered for the plaintiff, leave being reserved to the defendant to move to enter a verdict for him.

Macaulay, in the following Term, obtained a rule nisi to enter the verdict for the defendant on the issue joined on the third plea, on the ground that, under the above circumstances, trespass was not maintainable (a); against which

(a) During the progress of the suit, the plaintiff had died. By leave of a Judge, a suggestion was entered on the record

Mellor and *Hayes* shewed cause in last Term (January 23 and 25).—The plaintiff is entitled to maintain this action. First, his father having been in possession until he was dispossessed by the seizure of the lord quousque, when the fine was tendered, and the steward refused to admit the plaintiff, the possession reverted to him. A customary heir is a complete tenant before admittance, and may, therefore, enter and take the profits and maintain trespass or ejectment, without having been admitted, though he is not entitled to be sworn on the homage: 1 Scriven on Copyholds, p. 290, 4th edit.; 1 Watkins on Copyholds, 244. The tender of the fine and refusal by the steward was equivalent to admittance, and rendered the subsequent possession of the lord unlawful: *Arnold v. George* (a). In 1 Scriven on Copyholds, p. 290, 4th edit., it is said, "It would seem that a customary heir, who is refused admittance, will be tenant against the lord, though the lord lose his fine: *Austin v. Osborn* (b). So, also, will the widow of a copyholder, where admittance to freebench is requisite by the custom, and she has challenged her right to admittance: *Jurden v. Stone* (c). In *Doe d. Burrell v. Bellamy* (d), a customary heir, who had been refused admittance, recovered in ejectment against the lord, who had seized quousque. [*Parke*, B.—No doubt the tender and refusal put an end to the lord's possession, but did it put the heir into actual or constructive posses-

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under the 137th section of "The Common Law Procedure Act." The attorneys, however, not being aware of his death, had delivered their pleadings as if he were alive, and issue was joined before the suggestion was entered. The defendant traversed the suggestion, and objected at the trial, that it appeared by the record that the suit had abated, whereupon the learned Judge amended the suggestion by altering its

date. The rule nisi was also to strike out the amendments, but the Court said, that the rule of Court, which required pleadings to be dated the day on which they were delivered, did not apply to a suggestion, which was a mere entry on the record.

(a) Yelv. 16.

(b) Comyn. 245.

(c) Hutt. 18.

(d) 2 M. & Sel. 87.

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sion, so as to enable him to maintain trespass? *Martin, B.* —On the termination of a lease, the landlord cannot maintain trespass before entry.] This is not the case of a tenant holding over after the expiration of his term, but that of a person retaining possession by an abuse of the authority given him by law, whereby he became a trespasser ab initio: *The Six Carpenters' case* (a). In *Butcher v. Butcher* (b), Lord Tenterden, C. J., says, "If he who has the right to land enters and takes possession, he may maintain trespass." [*Parke, B.*—The entry on the death of the ancestor was done away with by the lord's seizure quousque; and it is clear, that an heir at law cannot maintain trespass before entry.]—Secondly, the admission of the plaintiff had relation back, so as to enable him to maintain this action in respect of the prior trespasses. There is no precise authority in point; but the old doctrine with respect to disseisin bears some analogy to this case. In Roll. Abr. "Trespas" (S.), pl. 3, 4, 5, it is said, "Si home soit disseise il poet aver brief de trespas pur le trespas fait en le disseisin, sans reentrie, car il mesme fuit seisie al temps del disseisin, que est sufficient possession a maintenir l'action: 19 Hen. 6. 28 b. tous agree. Mes si home soit disseise il navera brief de trespas pur aucun trespas fait per le disseisor devant reentrie, pur ceo que donque le franktenement fuit en le disseisor, et nemy en le disseisee: 19 Hen. 6. 28 b. Sic il ne poet aver trespas vers aucun estranger pur aucun trespas fait pur luy puis le disseisin, sans reentrie, pur ceo que it nad aucun possession al temps: 19 Hen. 6. 28 b." Again in "Trespas per Relation" (T.), pl. 5, 6, 7, 8, it is said, "Si home soit disseise, apres son reentrie il poet aver action de trespas vers le disseisor pur aucun trespas fait per luy puis le disseisin, car per son reentrie son possession est restore ab initio et tous temps apres: 19 Hen. 6. 28 b. Sic apres son reentrie il poet aver action de trespas vers aucun estranger pur un trespas

(a) 8 Rep. 146.

(b) 7 B. & C. 399.

fait puis le disseisin: 19 Hen. 6. 28 b. Come si B. disseise A., et C. disseise B., et puis A. reenter, il avera trespas vers C. pur son primer entrie, car il ad per cest reentrie reduce le possession a luy ab initio: H. 39 El. B. R., agree enter Holcombe et Rawlings. Contra Co. 11, Liford, 51. Issint si un disseisor leas pur anns ou vie ou done en tayie ou enfef al B. sur que le disseisee reenter, il avera trespas vers le lessee pur son primer entrie, coment que il vient eins per title, pur ceo que per relation le disseisee ad estre tous temps seisse del terre: H. 39 El. B. R. enter Holcombe et Rawlings adjudge sur demurrer. Contra Co. 11, Lyford 51; Contra 13 H. 7. 15 b., 16." Therefore, in the case of disseisin, although the possessory right was divested, yet, if the disseisee entered, his entry had relation back to his actual title, so as to enable him to recover in respect of trespasses committed before his entry. It may be said, that the case of disseisin does not apply here, because a disseisin is an ouster from the freehold, and here the freehold is in the lord, but the same principle prevails in actions for meane profits after a recovery in ejectment. The judgment in ejectment is an estoppel, as against the tenant in possession, from the day of the demise in the declaration: *Doe d. Wright* (a), *Doe v. Wellsman* (b), *Wilkinson v. Kirby* (c); but, if the plaintiff seeks to recover for the antecedent profits, he must prove his title and the execution of the writ of possession: Buller's *Nisi Prius*, 87 b, *Aslin v. Parkin* (d); or an actual entry, which is equivalent to it: *Calvart v. Horsfall* (e). That can only be on the ground that the entry relates back to the actual title. [*Martin*, B.—In *Starkie on Evidence*, vol. 2, p. 435, 3rd edit., it is said, "It seems to have been considered to be doubtful whether the plaintiff can recover any profits anterior to the time

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(a) 10 Ad. & E. 763.

(d) 2 Burr. 665.

(b) 2 Exch. 368.

(e) 4 Esp. 167.

(c) 15 C. B. 430.

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of actual entry, or whether a subsequent entry will not have relation to the time when the title accrued. As, however, trespass lies to recover mesne profits antecedent to the demise from the tenant in possession on his confession of the plaintiff's entry, it seems, upon the same ground, that an actual entry would have a similar relation."'] Also, in *Adams on Ejectment*, p. 342, 4th edit., it is said, "When the plaintiff seeks to recover the mesne profits accruing antecedently to the day of the demise in the declaration in ejectment, he must produce the regular proof of his title or right to the possession of the premises, and the judgment in ejectment is not admissible in evidence for him. He must also, it appears, in such case prove an entry upon the lands, though some doubt seems to exist as to what proof of entry will be sufficient." [*Parke, B.*—It is laid down by *Lord Coke*, that "acts, without words, may make an entry, but words, without an act (viz. entry into the land, &c.), cannot make an entry:" *Co. Litt.* 245. b.] As to what act amounts to an entry was considered in *Doe d. Griffith v. Pritchard (a)*. There is no reason for proving possession under the judgment in ejectment, except that it operates by way of relation to the actual title. So, in this case, the same relation ought to exist as against a wrongdoer.

Macaulay and *Field* in support of the rule.—First, a customary heir cannot maintain trespass before entry on the land. Here there was no sufficient entry. To constitute an entry, there should have been a formal demand of possession by the plaintiff's father on behalf of his son. [*Parke, B.*, referred to *Plowden*, 92, and *Co. Litt.* 253. b.]—Secondly, the admission of the plaintiff did not relate back to his actual title so as to entitle him to maintain trespass for the intermediate wrong. The doctrine contended for by the other side amounts to this, that, though the heir

(a) 5 B. & Ad. 765.

made no entry for five years, he might nevertheless recover the mesne profits. [*Parke, B.*—In Com. Dig. "Trespass," (B. 3), it is said, "So if the heir enters upon an abator, he shall not have trespass against him for the wrong before: 2 Rol. 554, l. 17. So, a disseisee shall not have trespass against a disseisor for the continuance in possession before his re-entry, except when his estate is determined so that he cannot re-enter: 2 Rol. 550, l. 7; 553, l. 52."] The doctrine with respect to disseisin affords no analogy to this case. According to the passages cited from Rolle's Abridgment, a disseisee might maintain trespass for the act of disseisin, without entry, because he was seised at the time of his disseisin; but, in order to support an action for the mesne profits, he must enter, and then his entry relates back to his original possession. The same doctrine was laid down in *Holcomb v. Rawlyns* (a), where it is said, "By the re-entry of the disseisee he is remitted to his first possession, and as if he never had been out of possession, and then all who occupied in the meantime, by what title soever they came in, shall answer unto him for their time." It is clear, however, from *Liford's case* (b), that the re-entry does not relate back so as to make persons who came in by lawful title from the disseisor trespassers. There the Chief Justice said, "If one disseises me, and during the disseisin he cuts down the trees, or grass, or the corn growing upon the land, and afterwards I re-enter, I shall have an action of trespass against him vi et armis for the trees, grass, corn, &c.; for, after my regress, the law, as to the disseisor and his servants, supposes the freehold always continued in me; but if my disseisor makes a feoffment in fee, gift in tail, lease for life or years, &c., and afterwards I re-enter, I shall not have trespass vi et armis against those who came in by title; for this fiction of the law, that the freehold always continued in me, shall not have relation to make him, who

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(a) Cro. Eliz. 540.

(b) 11 Rep. 46 a, 51 a.

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comes in by title, a wrongdoer vi et armis, for in fictione juris semper æquitas existit; but, in such case, I shall recover all the mesne profits against my disseisor." Again, in *Moore v. Hussey* (a) it is said, "At the common law, and before the Statute of Gloucester, cap. 1, if A. were disseised by B. and B. infeoffed C., or were disseised by him, A. had no remedy for damages against the feoffee or disseisor of his disseisor, but was to bring his assize against B., which was the immediate disseisor; and therein he was to recover the mesne profits by way of damage, not only for his own time but also for the profit received by the feoffee or second disseisor. And likewise, if A. the first disseisee had re-entered, whereby he had lost his assize, he might, by an action of trespass vi et armis, brought against his disseisor, recover the mesne profits for all the mesne possessions; but neither at the common law nor now can he recover upon his re-entry damages against the feoffee, lessee, or second disseisor, by action of trespass vi et armis, for that fits not his case as to them who did no immediate trespass." Therefore, assuming that the doctrine as to disseisin applies to this case, the admission of the plaintiff would not make the lord a trespasser by relation, for he was in lawful possession under the judgment in ejectment. But the case of *Litchfield v. Ready* (b) is an express authority, that the doctrine of relation applies only as between disseisor and disseisee. The foundation of the doctrine is, that, after the entry, the law, by a kind of jus postliminii, supposes the freehold to have all along continued in the disseisee: 1 Chitt. Plead. 198, 7th ed. This case is more analogous to that of a fine. An actual entry is necessary to avoid a fine, and the party so avoiding it cannot lay his demise in an ejectment, or recover the mesne profits that accrued before such entry: *Lee Compere v. Hicks* (c). The passage referred to in Buller's Nisi Prius, 87 b., is no authority for

(a) Hob. 98.

(b) 5 Exch. 939.

(c) 7 T. R. 727.

a relation in this case. It only amounts to this, that, in an action for mesne profits against the tenant in possession, the judgment in ejectment is conclusive evidence of title at the date of the demise in the declaration; but that, in order to recover the profits for an antecedent period, the plaintiff must prove his title at that time. Here the plaintiff did not enter at the time his title accrued, and there is no authority for the position that his subsequent admittance related back so as to make the lord, who was in lawful possession, a trespasser.

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Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—The question in this case arises upon a motion for a new trial, upon some points reserved, in an action of trespass brought against the lord of the manor by an infant heir of a copyholder, and tried before my Brother *Maule* at the Summer Assizes at Leicester. The only remaining point undisposed of by the Court, when the case was heard during last Term, is, whether the infant copyholder, who had been admitted by the lord to his copyhold, and by his father and guardian had actually entered into possession in November, 1853, could maintain an action of trespass for the wrongful occupation by the lord of the land for a prior period of three months, ending in November. As the heir at law cannot maintain trespass without entry, the simple question is, whether, after entry, his right of possession *relates back* so as to support an action against a wrongdoer for a trespass committed at an antecedent time.

Most of the authorities upon the question were brought before us by the learned counsel on both sides, and the result is, that the point is left in some degree of uncertainty, it never having been actually decided. In Buller's *Nisi Prius*, p. 87 b, it is stated to be doubtful whether the actual

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entry (which is on all hands admitted to be necessary to give a right of action to a person who has not been in actual possession of land), will enable him to recover not only for trespasses subsequent to the entry, but also by relation, for those which have been committed since the title accrued. The same prevailing doubt has been expressed, in somewhat similar terms, in my Brother Adams' book on Ejectment, p. 342, with an inclination that the better opinion was in favour of the title by relation; and to the same effect is 2 Starkie, 435, 3rd ed., with a strong intimation that the relation exists.

In more recent times, the case has incidentally come under the consideration of the Courts. In the case of *Litchfield v. Ready* (a), in which the plaintiff brought an action of trespass for the meane profits against the lessee of the mortgagor, this Court held that the action would not lie; and in delivering judgment I expressed an opinion, that the doctrine of the relation of an entry to the prior title was confined to the case of *disseisin*, referring to the citations in Comyns' Digest, "Trespass" (B. 2). In the case of *disseisin*, the authorities are clear as to the right of the disseisee to recover against the disseisor or a stranger, after re-entry. The entry, however, has no relation to make him who comes in by title under the disseisor, as his feoffee or lessee, a trespasser; but, in such case, the disseisee shall recover all the mesne profits against the disseisor, both those taken by himself and by his feoffee or lessee: *Litchfield's case* (b). Where there is an *abatement*, it is said (c), if the heir enter on the abator, he shall not have trespass against him for the wrong before; and 2 Rolle's Abridgment, "Trespas per Relation," (T.), pl. 3, is cited in support of that proposition; and the reason given in Rolle is, that it cannot relate to settle the *possession in him ab initio*, where he had never any before; and if this were law, it would be in

(a) 5 Exch. 939. (b) 11 Rep. 51 a. (c) Com. Dig. Trespass, (B. 3).

favour of the argument, that no action of trespass would lie in this case, for the infant never had the possession, and the case bears a strong analogy to if it be not one of abatement. But we find that the doctrine, that no relation exists in abatement, is not clearly established. It is contrary to the case in the Year-book 19 Hen. 6, 28 B., which is referred to in 2 Rolle's Abridgment, "Trespas per Relation," (T.), pl. 3, as being contra. *Newton, J.*, there laid down distinctly, that the relation prevails in the case of abatement as well as disseisin; at the same time it must be observed, that, in the Year-book 22 Hen. 6, 48 B., *Ayscoghe, J.*, seems to have been of opinion, that the heir, after entry on an abator, could recover for a subsequent continuance in possession, but not for that which was prior. The point, therefore, is not very clear. It is, however, highly reasonable that the relation should take place, otherwise the heir would have no remedy for trespasses committed by the abator, however great, which might go to the destruction of the value of the freehold itself. It may be said, that it is the fault of the heir at law not to have entered before, and that he suffers by his own laches, which is not the case where an administrator sues for mesne injuries, and where the law clearly gives that relation, as will be afterwards mentioned. But still it may happen, that serious injuries may be done to the estate before the heir could enter, for which the law ought to afford redress; and he may be an infant, he may be absent, he may be ignorant of the death of the ancestor, and in all these cases it would be very unjust that he should have no remedy for a great wrong. This case from the Year-book 19 Hen. 6, 28 B., and these considerations, create a great doubt whether I was justified in saying, that the doctrine of relation in actions of trespass to real property was confined to cases of disseisin.

As to trespasses with respect to personal chattels, the law undoubtedly establishes a relation for the purposes of

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justice. Though the title of the administrator to personal chattels accrues only by the grant of administration, it is quite settled that there is a relation to the death of the intestate so as to recover for mesne injuries to them, or for their conversion; otherwise there would be no remedy for the wrong done, and the relation is allowed for that reason: Com. Dig, "Administration" (B. 10); and, by parity of reasoning, the law ought to give a relation to enable the administrator to recover for mesne injuries to leasehold property; and Lord *Ellenborough*, in *Rex v. The Inhabitants of Horsley* (a), seems to have been of opinion that such relation existed. Whether, in order to bring an action of trespass, he should make an actual entry, his Lordship does not state.

But the strongest argument urged in favour of the doctrine by relation in actions of trespass to land arises from the practice in actions for mesne profits, which forcibly struck the mind of Mr. Justice *Coltman*, as is stated in the report of the case of *Tharpe v. Stallwood* (b). It appears to be the established practice in these actions, where the plaintiff seeks to recover profits anterior to the day of the demise from the tenant in possession, or at any date from an occupier not the tenant in possession, that the plaintiff may recover them if he proves his title to the possession at the time the profits were so taken, and also the execution of the writ of possession or actual possession taken; for taking actual possession has the same effect as the execution of an *habere facias possessionem*, as explained in a note of my Brother Manning in *Butcher v. Butcher* (c); 2 Starkie on Evidence, 453, 3rd ed.; Adams on Ejectment, 342, 2nd ed.; Roscoe on Evidence, 579. If this be so, upon what principle can it be, as Mr. Justice *Coltman* observes in the place cited, except that the person so entering and taking

(a) 8 East, 410.

(b) 5 M. & Gr. 760.

(c) 1 M. & R. 221; 7 B. & C. 339.

possession was entitled thereby to those profits at the time they arose, and that can only be by relation back of the entry to the actual title as against the wrongdoer. To these profits the doctrine of estoppel by the record in ejectment cannot possibly apply; and, therefore, it is not by means of the fiction of an ejectment, but by virtue of the relation back at common law, that they are recoverable.

We think, therefore, upon full consideration of this important question, that the argument that there is a relation back from the time of actual entry to the time of the legal right to enter, must prevail,—a relation created by law for the purpose of preventing wrong from being dispunishable, upon the same principle on which the law has given it in other cases. Therefore the rule will be discharged.

Rule discharged.

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WILKINSON v. SHARLAND.

May 1.

IN this case the declaration stated, that "the plaintiff sues the defendant for freight," omitting the words "for money payable." The defendant pleaded, never indebted, and a verdict was found for the plaintiff. The Court refused to arrest the judgment, and it was entered up for the plaintiff (a). The defendant thereupon took proceedings in error. * A writ of the alleged error was lodged with the Master, and a copy thereof served on the plaintiff, and bail was put in, whereupon the plaintiff took out a summons to amend the declaration; and the matter having been referred by the Judge at chambers to the Court,

Under the 222nd section of "The Common Law Procedure Act, 1852," amendments may be made after judgment and commencement of proceedings in error; and since, by the 155th section of that Act, the record is not removed into the Court of error until the

day of its sitting, the application to amend should be made to the Court below.

(a) 10 Exch. 724.

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Watson, in last Term (April 27th), obtained a rule nisi accordingly; against which

Knowles and *Udall* now shewed cause.—First, this is not the Court to which the application should be made. Assuming that there is a power to amend, it can only be exercised by the Court of error; because, now the record itself is removed to that Court, and not a mere transcript as formerly. By the 155th section of the Common Law Procedure Act, 1852, “upon such suggestion of error alleged and denied being entered, the cause may be set down for argument in the Court of error in the manner heretofore used; and the judgment roll shall, without any writ or return, be brought by the Master into the Court of error in the Exchequer Chamber, &c., on the day of its sitting, at such time as the Judges shall appoint, either in term or in vacation, &c., and the Court of error shall and may thereupon review the proceedings, and give judgment as they shall be advised, and such proceedings and judgment as altered or affirmed shall be entered on the original record; and such further proceedings as may be necessary thereon shall be awarded by the Court in which the original judgment was given.” [*Parke*, B.—The record remains in this Court until the Master takes it into the Court of error, and he is not to do so until the very day of its sitting. *Platt*, B.—The Master says, that he never removes the record until the day appointed for the hearing of the case.]—Secondly, the Court has no power to make this amendment. Formerly, no amendment could be made after judgment except for a misprision of the clerk, and even then there must have been something to amend by. Therefore, independently of the Common Law Procedure Act, 1852, this amendment could not be made, and there is no power to make it under that Act. By the 222nd section, “it shall be lawful for the superior Courts of common law and every Judge thereof, and any Judge sitting at Nisi

Prius, at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not, and all such amendments may be made with or without costs, and upon such terms as to a Court or a Judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made, if duly applied for." That enactment does not authorise the Court to amend after final judgment. [*Parke, B.*—It says "at all times."] Those words are controlled by the other part of the section. The power is given to the Court, to a Judge at chambers, and to a Judge at Nisi Prius, "for the purpose of determining *in the existing suit* the real question in controversy." The language clearly shews that the legislature only contemplated amendments in the course of the proceedings, and before verdict. Unless the amendment be necessary for determining the real question in controversy between the parties, it cannot be made: *Wilkin v. Reed* (a). Here the question in controversy has been already determined, and to allow this amendment would be in effect to alter the verdict of the jury, which was pronounced with reference to the allegation in the declaration, which may mean either that the money was or was not then due. In *Mellish v. Wilkinson* (b) *Bayley, B.*, said, "So strictly has the law considered that the pleadings in the suit, and the judgment proceeding thereon, shall form the only grounds of the record, that, when it was found expedient that the opinion, in point of law, of the Judge who tried the cause should be made the subject of revision by a superior Court, the Statute of Westminster (13 Edw. 1), expressly gave authority for that purpose by a bill of exceptions." But if this amendment be allowed, the Court

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(a) 15 C. B. 192.

(b) 1 Cl. & F. 225.

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might, after judgment, alter the declaration in every case where it omitted to allege the performance of a condition precedent, provided it appeared from the Judge's notes that the condition had been performed.—Thirdly, assuming that the Court has the power to amend, this is not a case in which they will exercise it. An amendment is never allowed 'unless it is necessary; but the Court by refusing the defendant's application to arrest the judgment, have decided that no amendment is necessary. If the judgment had been arrested, the plaintiff might, under the 143rd section of the Common Law Procedure Act, 1852, have suggested the existence of the omitted fact, viz. that the money was payable, and it would have been competent for the defendant to traverse that allegation. Therefore, by refusing the defendant's application and allowing this amendment, the defendant is prevented from trying the real question in controversy.

Watson and Chandler appeared in support of the rule, but were not called upon to argue.—They referred to *Lane v. Hooper* (a).

PARKE, B.—I entertain no doubt about the power of this Court to make the amendment. The omission in the declaration of the words "for money payable" was a mere slip, and it is clear that the real question which the parties meant to try has been tried, viz. whether the defendant was indebted to the plaintiff for freight. Then, in order to avoid the possibility of the Court of error being of a different opinion from this Court as to the effect of the omission of those words from the declaration, the plaintiff applies to amend. I think that we ought to extend the power of amendment as far as we reasonably can, in order to prevent parties from being tripped up by technical objections.

(a) 3 E. & B. 731.

The defendant's case has been supported by a very ingenious argument founded on the 143rd section of the Act, which however has not convinced me. The rule will be absolute on payment of the defendant's costs of the motion in arrest of judgment, of the proceedings in error, of the summons at chambers, and of the present application.

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PLATT, B., and MARTIN, B., concurred.

Rule absolute accordingly.

TURNOUGH v. STOCK.

May 1.

EJECTMENT to recover possession of three dwelling-houses, situate in John Street, Manchester.

At the trial, before *Cresswell*, J., at the last Liverpool Assizes, it appeared that the plaintiff claimed as heir-at-law of Abraham Turnough, deceased, who by his will devised as follows:—"After payment of my just debts and the expenses of my funeral, I give to my wife Hannah Turnough the use of all my money, linen, beds, and bedding, household goods and furniture of all kinds, to hold, use, and possess the same during her life; and also the rents and profits arising from all those three dwelling-houses, messuages, or tenements, being numbered three, four, and five, situate in John Street, Manchester, county of Lancaster, and from two other dwelling-houses at the back of the aforesaid numbers three and four, in the several occupations of &c., the whole of which premises are subject to the yearly chief rent of two pounds three shillings and three pence: and from and immediately after the death of my aforesaid wife, I give and bequeath to my daughter Susannah Burchel, wife of John Burchel, for her sole and separate use, all my money, linen,

A testator bequeathed to his wife the rents and profits of certain dwelling-houses, which were subject to a yearly chief rent, and after the death of his wife he bequeathed to his daughter the dwelling-houses (without words of limitation), subject to the payment of the chief rent:—*Held*, that the charge was not on the person of the devisee but on the estate, and consequently it was not, by implication, enlarged into a fee.

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beds, and bedding, household goods, and furniture aforesaid ; and also all those two dwelling-houses before mentioned, being numbered four and five, situate in John Street, Manchester, Lancaster, in the several occupations of &c., subject to the payment of one-half of the yearly chief rent aforesaid. Also I give and bequeath to my daughter Mary Stock, wife of Edmund Stock, for her sole and separate use, all that dwelling-house, messuage, or tenement before mentioned, being numbered three, situate in John Street, Manchester, in the occupation of &c.; and also all those other two dwelling-houses before mentioned, being at the back of and adjoining the aforesaid dwellinghouses, numbered three and four, in the several occupations of &c., also subject to the payment of one-half of the yearly chief rent before mentioned." The defendant claimed under Mary Stock who was dead.

It was submitted on the part of the defendant, that, according to the true construction of the will, Mary Stock took an estate in fee in the dwelling-houses in question, since there was a gift to her of an indefinite estate, subject to the payment of a perpetual charge. The learned Judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him.

Monk moved for a rule nisi accordingly (April 19).—This case falls within the well-known rule, that a condition or direction imposed on a devisee, to pay a sum of money, enlarges an estate without words of limitation into an estate in fee simple. The ground upon which that rule has been established is, that, if the devisee were to take an estate for life only, he might be a loser by the determination of his interest before the reimbursement of his expenditure; and the fact that actual loss is highly improbable, by reason of the smallness of the charge in proportion to the value of the estate, does not prevent its enlargement: Powell on Devises, vol. 2, p. 379; Jarman on Wills, vol. 2, p. 171. [*Parke*, B. —If the charge is imposed on the *land*, the devisee takes

it subject to the charge; but, if the charge is imposed on *the person*, the implication is, that the testator intended the devisee to take a fee. According to the terms of this will, it is the estate alone which is charged.] The gift is "*subject to the payment of one-half of the yearly chief rent, which, therefore, the devisee is bound to pay.*" The case is similar to that of *Smith v. Tyndal* (a), where a testator, being seised in fee, by his will gave several personal legacies, and amongst others, four coats to four poor boys of a certain parish for ever; and he then devised all his lands, tenements, and hereditaments whatsoever, and likewise all his goods, chattels, money, and personal estate to his wife and her assigns; and it was held, that the devise to the wife was a fee, because it was subject to a perpetual charge. Here the estate is given subject to the condition of the devisee paying the chief rent. The authorities are collected in *Jarman on Wills*, Vol. 2, pp. 172, 173.

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v.
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Cur adv. vult.

POLLOCK, C. B., now said,—The question in this case turned on the construction of a will, by which the testator devised three dwelling-houses, "subject to the payment of one-half of a yearly chief rent." It was contended, on behalf of the defendant, that there being no words of inheritance, the gift, subject to the charge, enlarged the life estate into a fee, according to the well-known rule, that, where a devisee takes an indefinite estate, with a condition imposed on him to pay a sum of money, the estate is enlarged by implication into a fee, for otherwise he might derive no benefit whatever from the bequest. We are all of opinion that, in this case, the charge is not upon the *person*, so as to enlarge the life estate into a fee, but upon the *estate* only, in which case the devisee takes it subject to the charge. There will, therefore, be no rule.

Rule refused.

(a) 2 Salk. 684.

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May 3.

EVANS v. ROBINSON.

Where a new trial is granted on the ground that the verdict was against evidence, the party who has succeeded on the second trial, but failed on the first, is not entitled to the costs of the trial without a special order of the Court.

THE *Attorney-General* moved for a rule, calling on the defendant to shew cause why the Master should not review his taxation of the plaintiff's costs. The case had been twice tried. On the first trial, a verdict was found for the defendant, but a rule was afterwards made absolute for a new trial, on the ground that the verdict was against evidence. The rule made no mention of costs. On the second trial, a verdict was found for the plaintiff. The Master, acting on the 44th section (a) of the Common Law Procedure Act, 1854, disallowed the plaintiff the costs of the first trial, and of the rule for a new trial. [*Parke, B.*—The costs remain the same, as where formerly the Court ordered the costs of the first trial to abide the event. *Pollock, C. B.*—The practice is so inveterate, that, in one case the Court of Common Pleas refused to allow a party who had succeeded on a second trial the costs of the first, in which the verdict had been obtained by perjury and fraud. It was urged, that, not to allow those costs, was in some measure to reward infamy; but the Court said, that they could not alter the established practice.] It is a hardship, that a party, who has finally succeeded, should be made to pay the costs of setting aside a verdict which ought never to have been obtained. [*Pollock, C. B.*—The Court might have made a special order as to the costs of the first trial, but not having done so the plaintiff is not entitled to them. Where the same party succeeds on both trials, he gets the costs of both; but, where the result of the second trial is different,

(a) Sect. 44:—"When a new trial is granted on the ground that the verdict was against evidence, the costs of the first trial shall abide the event, unless the Court shall otherwise order."

the party who has succeeded on the first trial never pays the costs of it.

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PER CURIAM (a).—There will be no rule.

Rule refused.

(a) *Pollock, C. B., Parke, B., Platt, B., Martin, B.*

ROBERTS and Another, Executors of JOHN ROBERTS,
 deceased, Appellants; LUCAS, Respondent.

May 5.

THIS was an appeal from a decision of the Judge of the county court of Shropshire holden at Wem, on the 18th December, 1854.

The action was brought to recover 42*l.* 4*s.* 10*d.*, the balance of three bills of costs alleged to be due to the plaintiff upon a guarantee given to them by the defendants' testator. The representative capacity of the defendants, and that their testator left assets, were admitted.

The plaintiff was surviving partner in the late firm of "Walmsley & Lucas," who carried on business at Wem, as attornies and solicitors. In September, 1848, the plaintiff and his late partner were applied to by one John Robinson, a cheese-factor at Leighton, to take out a fiat in bankruptcy against him on his own petition, which they consented to do on receiving the above-mentioned guarantee. A fiat was accordingly issued, and assignees appointed. On the 11th of August, 1854, duplicates of the bills of costs were signed by the plaintiff, and inclosed in an envelope and put into the post-office at Wem, addressed to "Mr. John Robinson, 46, Brunswick Road, Liverpool," the bankrupt.

A bill of costs, signed by the attorney and headed in the matter of business, but not addressed to any one, was inclosed in an envelope and sent by post to the client:—*Held*, a sufficient delivery of the bill to the party to be charged therewith, within the 6 & 7 Vict. c. 73, s. 37.

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 Respondent.

On the same day the plaintiff's clerk also left duplicates of the same bills, also signed by the plaintiff, in an envelope at the residence of the defendant James Roberts, in Wem, with his servant (he being then from home), addressed to "The Executors of the late Mr. John Roberts." Each of the bills was headed—"In the Matter of the Bankruptcy of John Robinson," and signed thus:—"1854, August 11. This is the bill of Walmsley & Lucas. WILLIAM LUCAS, surviving partner of the said firm of Walmsley & Lucas."

No letter or note accompanied the bills, and neither the names of the defendants nor that of their testator were mentioned, either at the head or in any part of the bills. No duplicates or copies were sent to the other defendant, Mr. John Roberts.

The defendants' advocate objected that there was not a good delivery of the bills, pursuant to the statute, inasmuch as they were not headed with the names of the parties to be charged, and that it did not appear on the face of the bills that the defendants were the parties whom the plaintiff sought to charge. On behalf of the plaintiff, it was contended, that the direction on the envelope inclosing the bills must be taken in connection with the bills, and was sufficient. The judge ruled, that there was a sufficient delivery of the bills, and gave judgment for the plaintiff.

The question for the opinion of the Court is, was there a good delivery of the bills.

Gray for the appellants.—There was no sufficient delivery of the bills of costs "unto the party to be charged therewith," as required by the 6 & 7 Vict. c. 73, s. 37 (a). The object of

(a) Enacts, "That, from and after the passing of this Act, no attorney or solicitor, nor any executor, administrator, or assignee of any attorney or solicitor, shall commence or maintain

any action or suit for the recovery of any fees, charges, or disbursements, for any business done by such attorney or solicitor, until the expiration of one month after such attorney or so-

that enactment was to inform the party to whom the bill is delivered, that the attorney looks to him for payment, so that he may tax the bill if he thinks fit. Here there is nothing on the face of the bill to indicate that the defendants are the parties to be charged. [*Parke, B.*—The question is, whether the bill and envelope taken together do not import that the plaintiff means to charge the defendants. If the plaintiff had written inside the envelope, "I send you your bill," would not that have been sufficient? The next step is, supposing he had so written on the outside of the envelope, might not the envelope be read together with the inclosure? Then, to go a step further, is not the address equivalent to that?] The address is no part of a letter. It is merely a direction to enable the person conveying the letter to find the person to whom it is addressed, and to let him know that the inclosure is intended for him. This case is distinguishable from *Taylor v. Hodgson* (a), for there the letter, in which the bill was inclosed, directly referred to the bill. *Wightman, J.*, in delivering judgment says, "The question was, whether the plaintiff was entitled to read the letter and the bill together, to shew who was the person to be charged therewith. It appears to me, that the plaintiff may do so under the 37th section of the 6 & 7 Vict. c. 73. That section enables the plaintiff to connect the letter and the bill, *if the latter is referred to*, for the

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licitor, or executor, administrator, or assignee of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges, and disbursements; and which bill shall either be subscribed with the proper hand of

such attorney or solicitor (or, in the case of a partnership, by any of the partners, either with his own name or with the name or style of such partnership), or of the executor, administrator, or assignee of such attorney or solicitor, or be inclosed in or accompanied by a letter subscribed in like manner, referring to such bill," &c.

(a) 3 D. & L. 115.

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purpose of the signature of the party sending it; but as the letter and the bill must both be read in order to ascertain if there be a reference or not, it seems to me sufficient under the Act, if the bill and the letter together shew who is the person to be charged." [Pollock, C. B.—In Webster's Dictionary, it is said, that the word "bill" means "any written paper containing a statement of particulars." It does not seem essential, that a bill should contain the name of the person intended to be charged.] An indictment or a bill in Chancery would be incomplete, unless the party intended to be charged was named therein. [Parke, B.—Is there any authority for saying, that the party must be debited therewith *on the face of the bill*?] It has been so decided under the Irish Act, 7 Geo. 2, c. 14, s. 9, *Manning v. Glyn* (a). [Platt, B.—Surely the bill ought to inform the person to whom it is delivered, that he is intended to be charged.]

Phipson for the respondent.—The statute does not require that the bill should be addressed to any one; and, therefore, the question depends on what is the legal acceptance of the term "bill,"—whether any paper or document containing items of charge, and delivered by the creditor to the debtor, is not, in legal apprehension, a "bill," although it does not on the face of it name the party to be charged. As observed by *Maule* arguendo in *The Bank of England v. Anderson* (b), "the word bill is one of the most general that can be used, wherever it is not confined by other terms. A bill in Parliament, a bill in Chancery. In every kind of business the word 'bill' occurs as representing any writing. A bill of lading, a bill of parcels, a play bill, a bill of fare, a bill of divorcement." [Pollock, C. B.—Suppose the bill was personally delivered to the client by the attorney, who said, "this is my bill," would not that be suf-

(a) 1 Jones Ir. Exch. Rep. 513.

(b) 3 Bing. N. C. 601.

ficient? The envelope only secures the delivery to the right person.] *Cozens v. Graham* (a), and *Taylor v. Hodgson* (b), are authorities to shew that the address on the envelope may be referred to as designating the party to be charged. If the words "To Mr. Roberts," (without saying debtor) had been on the bill, that would have been sufficient, and the address on the envelope has the same effect.

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The Court then called on

Gray in reply.—It ought to appear, either on the face of the bill itself or by some accompanying document, that the defendant is the party intended to be charged: *Grindley v. Austen* (c), *In re Bush* (d). Here the bill itself conveys no information, and the address on the envelope does not raise any inference that the defendant was looked to for payment. [*Parke, B.*—In the case of *Manning v. Glyn* (e), *Joy, C. B.*, says, "The Act does not say that the person to be served is the person sought to be charged by the plaintiff, it is the person chargeable *by* the bill, not *with* the bill." That is a mistake. The Irish Act, 7 Geo. 2, c. 14, s. 9, says, the person chargeable *with* the bill. In the 6 & 7 Vict. c. 73, s. 37, the words "charged therewith" mean charged with such fees, charges, and disbursements, not charged with the bill. The word "therewith" refers to the next antecedent, and that is "fees, charges, and disbursements;" the word "bill" does not occur untill afterwards.]

Phipson referred to *Phipps v. Daubney* (f).

POLLOCK, C. B.—We are all agreed as to the answer to be returned to the question submitted to us, viz. was there a good delivery of these bills of costs? That depends on whether the delivery of the bills in an envelope

(a) 12 C. B. 398.

(b) 3 D. & L. 115.

(c) 16 Q. B. 504.

(d) 8 Beav. 66.

(e) 1 Jones Ir. Exch. Rep. 513.

(f) 16 Q. B. 514.

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directed to the person intended to be charged is sufficient to satisfy the 6 & 7 Vict. c. 73, s. 37. I am of opinion that it is. Cases might be put, and may possibly have arisen, which would lead to a different construction; but in my judgment, the question is always this, whether, under the circumstances of the particular case before the Court, a bill has been delivered in pursuance of the requirements of the statute. According to the Irish case of *Manning v. Glyn*, it would not be sufficient *personally* to deliver a bill which contained the items of charge, unless the bill also contained a statement that the party to whom it was delivered was intended to be charged. That, however, is not the present case. It is admitted, that if the envelope was part of the letter, that is, if the bill and envelope constituted but one piece of paper, there would be no objection. I consider that the envelope and inclosure are to be read together, and if so, the bill was delivered to the party and addressed to him, for the address on the envelope is as good within the statute as an address upon the face of the bill itself. I think, therefore, that there was in this case a good delivery of the bills, and that, in that respect, the judgment of the county court judge was right.

PARKE, B.—I am of the same opinion. Under the circumstances of this case, that is, of a bill inclosed in an envelope addressed to the defendant, there is sufficient to satisfy the statute; for, supposing that the statute requires that there should be a notification in writing to the person charged, then, taking the bill and the envelope together, there is such a notification. In the case of *Phipps v. Daubney* (a), in delivering the judgment of the Court of error, I am reported to have said, that no doubt the decision in *Manning v. Glyn* was correct. It was not necessary, however, to pay so much attention to that case as I should

(a) 16 Q. B. 514.

otherwise have done, because in *Phipps v. Daubney* the Court considered that the heading of the bill sufficiently charged the railway company within the meaning of the 6 & 7 Vict. c. 73, s. 37, whereas in *Manning v. Glyn* the bill had no heading. If the same case as *Manning v. Glyn* should hereafter come before this Court, I should not like either to be bound by that expression of opinion, or to be understood as saying the contrary, but I should wish to consider the question. Here there is sufficient to indicate the party meant to be charged.

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PLATT, B.—It occurred to me that a stricter rule ought to be laid down in respect to the delivery of bills under this statute; but the majority of the Court being of a different opinion, I surrender my own.

MARTIN, B.—I think that the bill and the envelope satisfy the statute.

Judgment for the respondent.

KEMP and Another v. HURRY.

May 8.

DECLARATION on a bill of exchange drawn by John and James Wright upon, and accepted by, the defendant for payment of 26*l.* 7*s.* 6*d.* three months after date, and indorsed by Messrs. Wright to the plaintiffs.

W. drew, and the defendant accepted, a bill of exchange for 26*l.* 7*s.* 6*d.*, as a renewal of a bill accepted

by the defendant's partner. The defendant afterwards petitioned the Insolvent Court, under the 7 & 8 Vict. c. 96, and named in his schedule, as creditors, the representatives of W., who was dead, with this description:—"Amount of debt, 30*l.*—These creditors hold a bill of exchange, drawn by self and partner, and afterwards renewed by self." The defendant obtained a final order for protection, and the indorsees of the bill afterwards sued him for the amount:—*Held*, that the bill was not set forth in the schedule, as required by the 22nd section of that statute, and therefore the defendant was not discharged from the debt.

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Plea—That, after the accruing of the cause of action in the declaration mentioned, and before the commencement of this suit, to wit, on &c., a petition for the protection of the defendant from process was duly, and according to the form of the statutes in that case made and provided, presented by the defendant to the Court for the Relief of Insolvent Debtors in England, and thereupon afterwards and before the commencement of this suit, to wit, on &c., a final order for protection and distribution was duly made in the matter of the said petition by a commissioner of the last-mentioned Court duly authorised in that behalf. And the defendant further says, that the debt in the declaration mentioned was contracted before the date of the filing of the petition.

Replication, No. 1.—That the debt in the declaration mentioned was due and payable at the time of the defendant filing his petition, and that the plaintiffs were not named in the defendant's schedule as creditors, or as claiming to be creditors for the debt in the declaration mentioned, nor was the bill in the declaration mentioned set forth in the defendant's said schedule.

No. 2.—That, at the time of the defendant filing his petition, the debt in the declaration mentioned was due and payable, and the plaintiffs were then, and thenceforth up to and at the time of making the final order in the plea mentioned, indorsees and holders of the said bill, and the plaintiffs were then known to the defendant, and were then known to him as being such indorsees and holders of the said bill, and that the plaintiffs were not named in the defendant's schedule as creditors, or as claiming to be creditors for the said debt.

Rejoinder.—The defendant joins issue on the plaintiff's replications.

At the trial, before *Parke*, B., at the Middlesex Sittings in last Hilary Term, it appeared that, in the year 1851, the defendant carried on business as a painter and glazier

in partnership with one Havell, They dealt, in the course of their trade, with Wright & Co., who were varnish manufacturers in Holborn, and being indebted to them in about 20*l*. Havell gave them a bill for the amount. Havell afterwards went to Australia, and when the bill became due, Wright & Co. having applied to the defendant for payment, he accepted the bill for 26*l*. 7*s*. 6*d*., on which this action was brought, as a renewal of the 20*l*. bill, the price of some additional articles being included in the amount. In March, 1854, the defendant petitioned the Insolvent Debtors Court under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96. At this time the only surviving partner in the firm of Wright & Co. was dead, and his personal representatives refused to give the defendant any information about the bill. The defendant inserted in his schedule the debt of Wright & Co. as follows:—

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Names and Descriptions of Creditors and Claimants, and their present or last Residences.	Amount. £ s. d.	When contracted.	Admitted or Disputed.	Nature and Consideration of the Debt and Securities, if any; also, if the Debt is disputed, the reason thereof.
The Representatives of Messrs. Wright & Company, Varnish Merchants, late of 134, High Holborn, are Messrs. Wallis, Varnish Manufacturers, Long Acre.	30 0 0	1852 and 1853.	Admitted.	For Varnish, &c. Ex partner's late Account. These creditors hold a bill of exchange drawn by Self and Partner, and afterwards renewed by Self.

The representatives of Wright & Co. were duly served with notice under the Act, but no notice was given to the plaintiffs. One of the plaintiffs, however, who was examined as a witness, stated, that he knew the defendant was about to take the benefit of the Insolvent Act, but he did not think it worth while to oppose him. The defendant subsequently obtained a final order for protection from process "in respect of the several debts and sums of money due or claimed to be due at the time of filing his petition,

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from the said petitioner to the several persons named in his schedule as creditors, or as claiming to be creditors for the same respectively, or for which such persons shall have given credit to the said petitioner before the filing of his petition and which were not then payable, and as to the claims of all other persons not known to the said petitioner at the time of making this order, who may be indorsees or holders of any negotiable security set forth in his said schedule."

It was objected on the part of the plaintiffs, that the defendant was not discharged from the debt in question, inasmuch as the bill was not set forth in his schedule. The learned Judge reserved the point, and left it to the jury to say whether the defendant, at the time he filed his petition, knew that the plaintiffs were the holders of the bill. The jury found in the negative, and a verdict was entered for the defendant, leave being reserved to the plaintiffs to move to enter a verdict for them for the amount of the bill.

Lush obtained a rule nisi to enter a verdict for the plaintiffs on the issue raised by the first replication; against which

Miller, Serjt., and *Beasley* shewed cause (April 28).—By the 7 & 8 Vict. c. 96, s. 22, a final order made under the provisions of the 5 & 6 Vict. c. 116, s. 10, as amended by that Act, shall protect the person of the insolvent "from all process in respect of the several debts and sums of money due or claimed to be due at the time of filing the petition from such petitioner to the several persons named in his schedule as creditors," &c., "or in respect of the claims of any other persons not known to such petitioner at the time of making the final order, who may be indorsees or holders of any negotiable securities set forth in such schedule." *Platel v. Bevil* (a) is an authority that a final order under

(a) 2 Exch. 508.

those Acts constitutes an absolute bar to an action for such debts. Here the jury have found, that, when the defendant filed his petition, the plaintiffs were not known to him as holders of the bill; the only question, therefore, is, whether the bill is properly set forth in the schedule. It is submitted that the description, though inaccurate, is sufficient, since it was made without any intention to mislead, and did not in fact mislead. In *Nias v. Nicholson* (a) the insolvent described the bill as *drawn* by him, whereas, in fact, it was *accepted* by him; and *Abbott, C. J.*, told the jury, that, if they thought that the bill mentioned in the schedule was meant for the bill on which the action was brought, and that the misdescription was a mistake and not intended to deceive any one, then the verdict ought to be for the defendant. In the case of *Forman v. Drew* (b) the insolvent was indebted to the plaintiffs, who carried on business under the name of "The Argoed Coal Company," in the sum of 82*l.* 2*s.* 6*d.* In his schedule, the insolvent described the debt as due to an agent of the plaintiffs, and he stated that the amount was 82*l.* The Court considered that, as there was no evidence of any intention on the part of the insolvent to mislead his creditors, and that as the mode in which the debt was described in the schedule was calculated to notify to the plaintiffs that the insolvent sought to be discharged in respect of their debt, the provisions of the 1 Geo. 4, c. 119, s. 6, had been complied with. Again, in *Reeves v. Lambert* (c), where the insolvent described himself as indebted in 100*l.* to a creditor who held his acceptance for the amount, and the creditor had previously indorsed the bill to the plaintiffs, but the insolvent was ignorant of that fact, it was held, that the schedule contained a true description of the person to whom the insolvent was indebted, within the meaning of the 1 Geo. 4, c. 119, s. 6. [*Platt, B.*—That statute only required a de-

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(a) 2 Car. & P. 120.

(b) 4 B. & C. 15.

(c) 4 B. & C. 214.

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scription of the *debt*, and that was correctly given.] Under the Acts in question, it is sufficient if there is such a description of the security as to convey an intimation to the creditor that the insolvent seeks to be discharged from the debt for which the security was given. Here it was proved that the plaintiffs were fully aware of it. [*Alderson*, B.—Is there no power of amendment?] The 30th section of the 7 & 8 Vict. c. 96, enables the commissioners to amend the schedule where there is a misdescription in the amount of the debt, without any culpable negligence or fraud or evil intention on the part of the petitioner. There is a similar provision in the 1 & 2 Vict. c. 110, s. 93. But the object of those enactments is to protect the insolvent from liability in respect of the surplus of a debt entered unintentionally for a less amount, and to prevent the creditor from receiving a dividend on a greater amount than is really due to him. In *Hoyles v. Blore* (a), where the insolvent, by mistake and without fraud, stated the debt to be 3*l.*, whereas it was 7*l.*, it was held that, inasmuch as the creditor was thereby deprived of the benefit of the notice to be given to creditors of 5*l.* and upwards, under the 71st section of the 1 & 2 Vict. c. 110, it was not a case within the 93rd section of that Act.—They also referred to *Lewis v. Mason* (b) and *Jervis v. Jones* (c).

Lush in support of the rule.—Under the 22nd section of the 7 & 8 Vict. c. 96, the final order operates as a bar against two classes of persons, first, those named in the schedule as creditors; secondly, persons not known to the petitioner, who are indorsees or holders of any negotiable securities *set forth in the schedule*. The bill on which this action is brought is not set forth in the schedule. There is nothing in the description by which it can be identified. *Beck v. Beverly* (d) decided, that the discharge

(a) 14 M. & W. 387.

(c) 4 Dow, P. C. 610.

(b) 4 Car. & P. 322.

(d) 11 M. & W. 845.

of an insolvent debtor from a debt in respect of which he has accepted a bill of exchange, is no discharge as to the bill in the hands of a third person, unless the holder's name be inserted in the schedule, or it be stated therein that he is unknown, pursuant to the 1 & 2 Vict. c. 110, s. 75. That decision is fortified by *Lambert v. Smith* (a), where *Maule, J.*, says, "I am disposed to think, that the Act requires that the schedule shall contain the name of the holder of a negotiable security, where his name is known; or, if he be unknown, some reference to him as holder or indorsee." *Nias v. Nicholson* (b) must be considered as overruled by *Leonard v. Baker* (c), and *Tyers v. Stunt* (d). It is difficult to reconcile all the cases. Under the old Insolvent Acts, the question was raised by the general issue and submitted to the jury; but now the new rules have made a more marked distinction between questions of law and fact. If the description in this case be held sufficient, it is difficult to say how far the inaccuracy may not extend. The 30th section of the 7 & 8 Vict. c. 96 having provided a remedy for a particular inaccuracy, the necessary inference is, that any other inaccuracy will vitiate the description.—He also argued, that upon these pleadings the plaintiffs were entitled to the verdict, inasmuch as the plea was bad, for not averring that the bill was set forth in the schedule, and that the holder was unknown to the defendant; and, that the replications afforded an answer to the plea. On this point he cited *Phillips v. Pickford* (e).

Cur. adv. vult.

PLATT, B., now said.—This was a rule to set aside the verdict for the defendant on the issue raised by the first replication, and to enter it for the plaintiffs for the amount of

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(a) 11 C. B. 358.

(d) 7 Scott, 349.

(b) 2 Car. & P. 120.

(e) 9 C. B. 459.

(c) 15 M. & W. 202.

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the bill set out in the declaration. The case was argued in the present term, before my Brother *Alderson*, my Brother *Martin*, and myself. Judgment was not given at the time, because we desired to consult the Lord Chief Baron and my Brother *Parke*, as I entertained some doubt upon the subject, my view being opposed to that of my two learned Brothers. The opportunity has been afforded us, and it now remains for me to pronounce the decision of the Court. [His Lordship then stated the facts, and proceeded:]—The question is, whether the bill on which the action is brought, is properly described in the defendant's schedule. It is quite clear, that the defendant meant to give an account of every one whom he supposed to be his creditors; and, that he was not aware that the bill had ever travelled out of the hands of Wright & Co. By the 22nd section of the 7 & 8 Vict. c. 96, the persons who are to be barred by a discharge under the Insolvent Act are those who may be indorsees or holders of any negotiable security *set forth in the schedule*. It was, therefore, a question, whether this acceptance of the defendant for 26*l.* 7*s.* 6*d.*, was set forth in the schedule. Now, so far from being set forth in the schedule, the bill, which was accepted by the defendant, is described as drawn by him; and, instead of a bill for 26*l.* 7*s.* 6*d.*, it is stated to be for 30*l.* Therefore, there is nothing on the face of this description which would enable any one reasonably to say, that the bill on which this action is brought is set forth in the schedule. It is to be lamented that the description was not more correct, because the plaintiffs were aware that the defendant intended to take the benefit of the Insolvent Act; therefore, all the notice which was necessary, was substantially given to them. However, the statute requires that the instrument should be correctly set forth in the schedule, and this has not been done; and, therefore, the rule must be absolute.

MARTIN, B., added.—In reality, all that is mentioned in

the schedule respecting this bill is, that it is a renewal,—
 “and afterwards renewed by self.” To hold such a description sufficient, would be to substitute a verbal statement for a written document, and to make an insolvent’s discharge depend entirely on parol evidence, which would lead to great inconvenience. I apprehend that the legislature intended that there should be something in writing, to shew that the discharge was in respect of that debt which is the subject of the action.

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PARKE, B.—I assent to what has been said by my Brothers *Platt* and *Martin*.

Rule absolute.

SHEPHERD, Deputy Master of the TRINITY-HOUSE, DEPT-
 FORD STROND, v. HILLS.

April 23.

THE following case was stated for the opinion of this Court, by consent and order of a Judge, pursuant to the Common Law Procedure Acts, 1852 and 1854.

The 32 Geo. 3,
 c. 74, s. 8,
 imposes cer-
 tain rates and
 duties “to
 be paid by the
 master or

owners” for every ship or vessel of a certain burthen passing from, to, or by Ramsgate. Sect. 14 declares, that “no coasting vessel or fisherman shall pay the duty charged by that Act oftener than once in any one year.” Sect. 15 empowers the collectors to distrain every ship and all the tackle, &c., for nonpayment of the duties. By sect. 16, if any master or owner of any ship or vessel shall elude or avoid payment of the duties, he shall stand charged and be liable to the payment of the same; and the same shall be levied and recovered from such master or owner by the same method by which fines and penalties imposed by that Act are levied and recovered. By sect. 72, penalties and forfeitures are to be recovered by action or distress. The defendant, who was sued for duties under the above Act, was the owner of a vessel which several times in the year sailed in ballast to Jersey, and brought from thence oysters, which the defendant purchased of fishermen there, and which he deposited in beds at Milton:—*Held*, first, that an action would lie on the statute for the recovery of the duties, and that the power of distress was merely a cumulative remedy; secondly, that the plaintiff’s vessel was not a “coasting vessel” or “fisherman” within the meaning of the above Act; thirdly, that the action being on a specialty, the period of limitation was twenty years, under the 3 & 4 Will. 4, c. 42, s. 3.

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This action is brought by the plaintiff, under the provisions of the 32 Geo. 3, c. 74, and other Acts for the Improvement of Ramsgate Harbour, on behalf of the trustees for carrying into execution the said Acts, for the recovery of certain tolls or dues claimed by the said trustees as due to them.

The 32 Geo. 3, c. 74, s. 8, is as follows:—"And be it further enacted, that the said trustees, or any such fifteen or more of them as aforesaid, at a public meeting (previous notice whereof shall be given," &c.), "are hereby authorised to settle and impose the several rates and duties hereinafter mentioned, which rates and duties shall commence and become payable from and after the 25th day of June, 1792, inclusive," &c.: "that is to say, any rate or duty not exceeding three-pence per ton, to be paid by the master or owners for every ship, vessel, or crayer, of the burthen of twenty tons or upwards, and not exceeding the burthen of three hundred tons, whether the same may be laden or in ballast, passing from, to, or by Ramsgate, whether on the east or west side of the Goodwin Sands, or otherwise passing by or coming into the harbour there (other than and except ships laden with coals, grindstones, or Purbeck, Portland, or other stones), not having a receipt testifying his payment before on that voyage; and for every ship, vessel, or crayer, which shall exceed the burthen of three hundred tons, any rate or duty not exceeding one penny for each ton of such ship (except ships laden with coals, grindstones, Purbeck, Portland, or other stones), and for every chaldron of coals, or ton of grindstones, Purbeck, Portland, or other stones, a rate not exceeding three-halfpence; and the said duties shall be paid every time such ship, vessel, or crayer shall sail from, arrive, or come into harbour at, or pass by Ramsgate as aforesaid (except as hereinafter mentioned); and such rates or duties, when settled by the said trustees, shall be forthwith published in the London Gazette for the information of all parties concerned; the same to be paid

to the customer or collector of the customs, or their deputies, or such other person or persons as shall be appointed by the trustees of this Act to receive the same, in such port or place whence such ship, vessel, or crayer shall set forth, or where such ship, vessel, or crayer shall arrive, before she sails from such port on her outward-bound voyage, and before unloading the goods on board thereof on her homeward-bound voyage; the amount of the number of such tons to be ascertained according to the rules laid down by an Act passed," &c. (26 Geo. 3, c. 60). "And that the rates and duties so to be levied and raised as aforesaid shall be applied, by or under the discretion of the said trustees, in or towards the enlarging, building, finishing, maintaining, and supporting and improving the said harbour of Ramsgate."

The 12th section enacts: "That no ship, vessel, or crayer outward-bound, the place of whose destination shall be to or by Ramsgate, shall be cleared at the office of his Majesty's Customs or subsidies on such outward-board voyage; nor shall any vessel who shall have sailed from or by Ramsgate, or have gone into harbour there, be allowed to enter at the said office on her homeward-bound voyage, by any officer or officers of his Majesty's Customs, without producing a certificate from the officer or person employed to collect the same, testifying the payment of the rates and duties imposed under the authority of this Act: and also that on producing a proper acquittance for the receipt thereof, such master or owner thereof shall have, and be entitled to, an allowance from the merchants, importers, or exporters, as follows; that is to say, for every ton of goods laden on board such ship or vessel on account of such merchants, importers, or exporters, a like sum per ton as is by this Act charged upon the ship or vessel on board of which such goods or merchandises shall be laden, and so in proportion for a less quantity than a ton."

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(The case then set out the 13th section, which relates to the appointment and duties of collectors).

The 14th section is as follows:—"Provided always, and it is hereby declared, that no coasting vessel or fisherman shall pay the duty charged by this Act oftener than once in any one year; nor shall any collier returning in ballast from the French or Flemish coast, producing a certificate of having paid the duty on her outward-bound voyage for her cargo of coals, be liable to the payment of any such duty for her inward-bound voyage, anything hereinbefore contained to the contrary notwithstanding."

The 15th section enacts, "That it shall be lawful for the collector or collectors, or any other person or persons authorised and deputed by the said trustees, to go on board any ship, vessel, or crayer, to demand, collect, and receive the said duties and rates by this Act due and payable, and for nonpayment thereof to take and distrain every such ship or vessel, and all the tackle, apparel, and furniture thereto belonging, or any part thereof, and the same to detain and keep; and in case of any neglect or delay in payment of any of the said duties and rates for ten days after any distress so taken as aforesaid, that then it shall be lawful for the said collector and collectors, receiver and receivers of the said duties and rates, to sell the said distress, and therewith to satisfy him or themselves, as well for and concerning the duty so neglected or delayed to be paid for, and for which a distress shall be so taken as aforesaid, as also for his or their reasonable charge in taking, keeping, and selling such distress, rendering to the master or other person having the rule and command of the ship or vessel in or from which such distress shall be so taken the overplus, on demand, if any there shall be."

Section 16 enacts: "That if any master, commander, or owner of any ship, vessel, or crayer shall, at any time before the commencement of this Act, have eluded or avoided the duties payable under the said former Act, or shall, at

any time from the commencement of this Act, elude or avoid, or attempt to elude or avoid, the payment of the duties hereby granted, by any method whatsoever, such master, commander, or owner of such ship or vessel shall stand charged with and be liable to the payment of the same, and the same shall be levied and recovered from such master or owner by the same method by which fines and penalties imposed by this Act are hereinafter directed to be levied and recovered."

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Section 72 enacts: "That all penalties and forfeitures by this Act, or any bye-laws, rules, orders, or ordinances to be made in pursuance thereof, to be imposed or incurred as aforesaid, the manner of recovering and levying whereof is not hereby otherwise particularly directed, shall be levied and recovered in any action of debt in any Court of record, in the name of the deputy master of the Trinity House, Deptford Strond, for the time being, and his successors, who is hereby empowered to bring such action or actions, in which no essoign &c. shall be allowed, or otherwise shall and may be recovered and levied by distress and sale, by virtue of the warrant of any of the justices of the peace, mayor, &c., or other magistrate of the town, district, or place wherein such offender or offenders shall reside," &c., "and in case of no sufficient distress being found, such justice of the peace, mayor, &c., may commit such offender to prison," &c.

(The case then set out the 52nd section, which directs, that all actions brought on the part of the trustees, in pursuance of that Act, shall be commenced in the name of the said deputy master of the Trinity House for the time being, and his successors).

The 32 Geo. 3, c. 74, with the subsequent Acts, and also the repealed Act 22 Geo. 2, c. 40, are to be taken as parts of this case.

The rates or duties for which this action is brought are rates or duties imposed by the said trustees in pursuance of

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the said Act, 32 Geo. 3, and the said subsequent Acts, upon vessels of the burden of twenty tons or upwards, and not exceeding the burden of three hundred tons, passing by Ramsgate, and made payable by the master or owner of such vessels, and which rates or duties are claimed as due in respect of voyages of "The James Harmer," "Good Intent," &c., from Milton, in the county of Kent, to Jersey and back by the harbour of Ramsgate, as mentioned in the 32 Geo. 3, c. 74.

The said vessels were owned by the defendant, and belonged to the port of London, and each of them was of more than twenty tons and less than three hundred tons burthen, viz. of sixty tons burthen or thereabouts. The defendant was and still is an oyster merchant and the owner and proprietor of the Milton Oyster Fishery Grounds, at Milton next Sittingbourne, in the county of Kent; and on each of the said voyages to Jersey, the said vessels sailed in ballast for the purpose of bringing back oysters; and, on each of the said voyages from Jersey, the said vessels were laden with oysters for the purpose of bringing the same to the defendant's said oyster grounds, and there depositing the same to fatten, and afterwards selling the same.

The course of business in the oyster trade between Jersey and England is, as far as concerns this case, as follows:— Full grown oysters are dredged in the Bristol Channel by fishermen who use for that purpose small vessels of from twenty to fifty tons burthen. The fishermen take the oysters to Jersey and there deposit them in places called "Oyster Parks," which are banks on the shore between the high and low water marks. The fishermen are paid for such oysters at a certain rate per tub by an oyster merchant in Jersey. The vessels employed by the fishermen in dredging belong to them, and not to any oyster merchant. The fishermen in general dredge on their own account, and are not employed by oyster merchants or owners of oyster fisheries or beds. Occasionally, though but rarely, the

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fishermen are sent out specially by particular merchants or owners of such oyster fisheries or beds to dredge oysters, and in such cases are paid sometimes by the tub of oysters caught and sometimes by the day. In all cases the fishermen carry on a distinct business from that of the oyster merchants or owners of oyster fisheries or beds. The oysters deposited in the said oyster parks are from time to time collected by hand at low water and laden on board vessels belonging to or freighted by oyster merchants or owners of such oyster fisheries and beds, and imported in such vessels to various parts and places in Kent and Essex. Until the 16 & 17 Vict. c. 106, these vessels had to clear the Custom-house at Jersey before leaving, and a declaration had to be first made that the oysters were British caught, and a certificate was then given to that effect. On arriving in England the oysters are placed on such oyster beds as aforesaid in or near the ports or places of discharge to fatten, and ultimately sent to market to London in vessels belonging to or freighted by the oyster merchants or owners of the said beds, and there sold on their account. The oysters are caught by the fishermen at Jersey from February to June, and come to market from August to May following.

The defendant's vessels were, on each of the above-mentioned voyages from Jersey, engaged in carrying from Jersey to Milton in Kent oysters which had been dredged and deposited, and which were imported to Milton and deposited on the defendant's said oyster grounds there, to fatten; and were afterwards sent to market according to the usual course of business as above described. The defendant's vessels on the said voyages carried no other cargo than oysters. Each of the said vessels performed annually in the spring several of the said voyages from Jersey to Milton. On some of the said voyages from Jersey to Milton, the said vessels were employed on account of the defendant, and on other of such voyages by other oyster

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merchants who paid freight for the said cargoes. The Court may draw such inferences of fact from the above statement as a jury might draw.

The defendant has, since the commencement of this action, paid the rates and duties payable in respect of each of the said vessels once in every year, as required by the said Act, which has been received without prejudice to the plaintiff's claim for a larger amount. The amount of rates or duties (if any) which have accrued due, if the said Acts authorise the levying of rates or duties in respect of each of the said voyages, is 102*l.* 12*s.* 6*d.* over and beyond the amount so paid; the sum of 52*l.* 8*s.* 6*d.*, part of the said 102*l.* 12*s.* 6*d.*, became due (if at all) more than six years before the commencement of this suit.

The questions for the opinion of the Court are—

First, whether an action at law is maintainable for the said rates or duties.

Secondly, whether the said Acts authorise the exaction of rates or duties in respect of each of the said voyages, or the exaction of only one payment of rates or duties per annum in respect of each of the said vessels.

Thirdly, whether the rates or duties payable annually or oftener (as the case may be) which accrued due more than six years before the commencement of this suit, can be recovered in this action.

Judgment by confession is to be entered for the plaintiff for such amount as the Court shall think fit, with costs, if judgment be for the plaintiff; or if judgment be for the defendant, then judgment of nolle prosequi, with costs, is to be entered.

Willes argued for the plaintiff in last Hilary Vacation (Feb. 8).—First, an action at law is maintainable for the duties imposed by the 32 Geo. 3, c. 74. The difficulty arises from the language of the 16th section, which enacts that if any master or owner of any ship or vessel shall elude or avoid payment of the duties thereby granted, he "shall

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stand charged with and be liable to the payment of the same, and the same shall be levied and recovered from such master or owner by the same method by which fines and penalties imposed by this Act are hereinafter directed to be levied and recovered." By the 67th section penalties and forfeitures are to be recovered by distress. But the words in the 16th section, "shall stand *charged with* and be *liable to the payment of* the same," are sufficient to create a duty in respect of which debt will lie, and the latter words of the section merely provide a cumulative remedy. In Com. Dig., tit. Dett, (A. 9), after enumerating other instances in which debt will lie, it is said, "So, for Customs due for merchandises, though the goods are forfeited for nonpayment: R. 1, Rol. 383." [Parke, B.—The statute says that the duties are to be *paid* by the master or owner, then an action of debt will lie for their recovery.]

The second question depends on whether these vessels are "coasting vessels or fishermen," within the meaning of the 14th section. [Parke, B.—They are certainly not fishermen. Alderson, B.—A fisherman is a vessel used for catching fish as well as carrying it: the carrying is merely incidental to the catching. These vessels only carry fish.] Neither are they "coasting vessels." Jersey is no part of the coast of England. It is one of the Channel Islands, which in the reign of Henry I. were attached to the kingdom of England as part of the Duchy of Normandy. Henry 3 yielded up Normandy to the crown of France, but retained these islands, which have ever since continued under the dominion of the Sovereigns of England: 4 Inst. 286; Com. Dig. "Navigation" (F. 3). They are not included in Acts of Parliament relating to Great Britain, unless mentioned in express terms. [Parke, B.—Does not a "coasting vessel" mean a vessel which in the ordinary course of its trading goes coastwise from one part of the Queen's dominions to another.] Davison v. McKibben (a)

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decided that an Irish vessel with a general cargo trading between Belfast and London, and not laden with corn or grain as specified in the 46 Geo. 3, c. 97, was not a coasting vessel or an Irish trader using the navigation of the river Thames as a coaster, within the meaning of the Pilot Act, 52 Geo. 3, c. 39, s. 2. [*Martin*, B.—If the plaintiff's construction be correct, a collier taking coal to Jersey would be bound to pay the duty both on her outward and homeward voyage, while a collier taking coal to the French or Flemish coast is only bound to pay on one voyage.] That may have been an oversight, as in the case of Ireland remaining a place beyond the seas: *Lane v. Bennett* (a); but as observed by *Buller*, J., "A casus omissus can in no way be supplied by a Court of Law, for that would be to make laws." Goods imported from a port in Ireland to Bristol are not brought coastwise: *Battersby v. Kirk* (b). [*Martin*, B. referred to the 12 & 13 Vict. c. 29, s. 20. *Alderson*, B.—Surely Jersey is part of the coast of Normandy. The circumstance of its belonging to the crown of England cannot alter its geographical coast, for, if so, Ceylon would be part of the coast of England. A "coasting vessel" must mean a vessel going along the coast. The middle point of the sea, between two countries, is the limit of the coast of each country.] Jersey is in the same condition as the Isle of Man, which is no part of the realm of England: Com. Dig. "Navigation" (F. 2). The Customs Act 8 & 9 Vict. c. 86, s. 113, declares that all trade by sea from one part of the United Kingdom to another or to the Isle of Man, shall be deemed to be a coasting trade, and all ships while employed therein shall be deemed to be coasting ships. Ships trading from the United Kingdom to Jersey are not coasting ships within that provision. [*Alderson*, B.—The Undercliff of the Isle of Wight is part of the coast of England. So when Calais was under the dominion of the English crown it was part of the realm of England; children born there were Englishmen and could

(a) 1 M. & W. 70.

(b) 2 Bing. N. C. 584; 2 Scott, 11.

inherit property in England; and a writ of error to the King's Bench would lie on a judgment given there: 4 Inst. c. 68. It is not so with the Channel Islands.]

Thirdly, the plaintiff is entitled to recover the duties which accrued due more than six years before the commencement of the suit. The action is founded on a statutory liability, and therefore the period of limitation is that prescribed by the 3 & 4 Will. 4, c. 42, s. 3, viz. twenty years, and not the six years mentioned in the 21 Jac. 1, c. 16, s. 2. The case of *The Cork and Bandon Railway Company v. Goode (a)* is a conclusive authority on this point. There it was held that an action of debt for railway calls was an action in respect of a statutory liability, and consequently that the period of limitation was twenty years. [Parke, B.—That is certainly a stronger case than the present, for there it might be said, that, although the statute gave the power to make the calls, they became *due* by contract.]

Shee, Serjt. for the defendant.—These vessels are “coasting vessels” within the meaning of the 32 Geo. 3, c. 74, s. 14. In all the navigation Acts, the trade between Great Britain and Guernsey and Jersey is treated as part of the coasting trade. The earliest Act relating to this subject is the 12 Car. 2, c. 18, the 6th section of which, although it does not use the term “coasting vessels,” speaks of vessels carrying goods “from one port or creek of England, Ireland, Wales, Islands of Guernsey or Jersey, or town of Berwick-upon-Tweed, to another port or creek of the same or of any of them.” Again in the 34 Geo. 3, c. 68, ss. 3, 4, and 42 Geo. 3, c. 61, s. 4, where provisions are made respecting the coasting trade, Guernsey and Jersey are included. The 3 & 4 Will. 4, c. 54, s. 12, requires the whole of the crew to be British seamen “if such ship be employed in a coasting

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(a) 13 C. B. 826.

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voyage from one part of the United Kingdom to another, or in a voyage between the United Kingdom and the islands of Guernsey, Jersey, Alderney, Sark, or Man, or from one of the said islands to another of them, or from one part of either of them to another of the same, or be employed in fishing on the coasts of the United Kingdom, or of any of the said islands." The 8 & 9 Vict. c. 88, s. 13, and 12 & 13 Vict. c. 29, s. 7, contain similar provisions. The 17 & 18 Vict. c. 5, which admits foreign ships to the coasting trade, subjects them to the same rules as British ships, if "employed in carrying goods or passengers coastwise from one part of the United Kingdom to another, or from the islands of Guernsey, Jersey, Alderney, Sark, or Man, to the United Kingdom, or from the United Kingdom to any of the said islands, or from any of the said islands to any other of them:" sect. 2. [*Parke, B.*—The question is, what was the meaning of the term coasting vessel in 1792, when the 32 Geo. 3, c. 74, passed.] *Davison v. Mekibben* (a) merely decided that a vessel trading between Belfast and London was not a coasting vessel with reference to the 46 Geo. 3, c. 97, and 52 Geo. 3, c. 39, s. 2. *Battersby v. Kirk* (b) has no bearing on this case: there it was held that statutes declaring Ireland not to be "beyond the seas" for revenue purposes, did not exempt goods brought from Ireland from the duties imposed by the British Dock Act, 48 Geo. 3, c. xii. But there is no decision that vessels trading to Jersey are not coasting vessels. At all events, the term "coasting vessel" is ambiguous, and as the Act imposes a burthen on the subject, the liability must be clear (c). [*Willes* referred to 5 Eliz. c. 5, s. 8].

PARKE, B.—The first question is, whether this action is maintainable for the rates or duties imposed by the 32 Geo.

(a) 6 Moore, 387.

(c) The learned Serjeant did

(b) 2 Bing. N. C. 584; 3 B. & not argue the other points.

B. 112.

3, c. 74, and I am of opinion that it is. There is no doubt that wherever an Act of Parliament creates a duty or obligation to pay money, an action will lie for its recovery, unless the Act contains some provision to the contrary (a). It is true that this statute gives a power of distress, but that is clearly a cumulative remedy. The next question is, whether these vessels come within the description of "coasting vessels" or "fishermen." They certainly do not come within the description of "fishermen." A fishing vessel is a vessel from which persons fish either with a line or net, and not a vessel merely used for carrying fish. With respect to the question whether they are coasting vessels, the case must stand over in order that we may obtain some further information on the subject. *Primâ facie* they are not "coasting vessels," because the term means vessels trading from port to port along the coast of the Kingdom of England; but it may nevertheless be shewn by contemporaneous authority or Act of Parliament, that the term has a different meaning. It is therefore important to ascertain what the facts have been as to the receipt of duties from vessels trading to the Channel Islands, and what has been the practice of the Custom House as to treating, or not, such vessels as coasting vessels. With respect to the question as to the Statute of Limitations, the 32 Geo. 3, c. 74, contains no clause of limitation; and therefore, according to the case of *The Cork & Bandon Railway Company v. Goode* (b), this being an action on a statute, there is the same period of limitation as in an action on a record or specialty.

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ALDERSON, B.—If the statute imposing these duties had passed now, a different interpretation might be put on the

(a) See *Goody v. Penny*, 9 M. & W. 687; *Anonymous*, 6 Mod 627; *Mayor of Swansea v. Hop-*
kins, 8 M. & W. 901. (b) 13 C. B. 826.

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term ; because, after the 17 & 18 Vict. c. 5, vessels trading between Jersey and the United Kingdom might be considered as coasting vessels.

PLATT, B. concurred.

MARTIN, B.—We ought to ascertain what were coasting vessels in 1792, with respect to the collecting of the duties of Customs.

Cur. adv. vult.

PARKE, B., now said—The Solicitor of the Customs has reported to us that vessels trading between England and Guernsey and Jersey have never been considered as “coasting vessels” within the Customs Act. Our judgment will, therefore, be for the plaintiff.

Judgment for the plaintiff.

April 18.

DEAN v. TAYLOR.

In an action of assault and battery, to which the defendant pleads the plea given by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76, Sched. B.), that “the plaintiff first assaulted the defendant, who thereupon

necessarily committed the alleged assault in his own defence,” the plaintiff may, under the general form of replication joining issue on the plea, and without replying excess, shew that, although he struck the first blow, the defendant was guilty of excess.

THE declaration stated that the defendant assaulted the plaintiff, and with a thick stick struck the plaintiff on the head with great violence and felled the plaintiff to the ground, and then seized the plaintiff while he lay on the ground by the hair of the head, and with his fist struck the plaintiff on the head and face, and then beat, bruised, dragged, and pulled about the plaintiff, whereby the right shoulder-bone of the plaintiff was broken, and the plaintiff became and was for a long time insensible, and was after-

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wards for a long time sick, sore, and disordered, and was thereby prevented from attending to his ordinary business or calling; and was thereby obliged and did subject himself to liability for expenses in obtaining medical assistance to cure him of the said injuries.

Pleas, first, not guilty; secondly, "that the plaintiff first assaulted him the defendant, who thereupon necessarily did what is complained of in his own defence." The plaintiff "joined issue" on each of these pleas.

At the trial, before *Parke*, B., at the last York Assizes, it appeared that the action was brought to recover compensation for a severe injury which the plaintiff had sustained from an assault upon him by the defendant. On the part of the defendant it was contended, that the plaintiff had, in the first instance, assaulted the defendant; and that if the plaintiff relied upon excess, he should have replied it. The learned Judge left it to the jury to say which of the parties had struck the first blow, and whether the defendant had used more violence than was necessary to defend himself. The jury found that the plaintiff had struck the first blow, and they found the second question in the affirmative. The learned Judge was of opinion that the plaintiff was entitled to the verdict upon this finding, and accordingly a verdict was entered for him with 25*l.* damages, leave being reserved to the defendant to move to set the verdict aside and enter it for him, if the Court should be of opinion that the plaintiff ought to have replied excess.

Wilkins, Serjt., now moved accordingly, and also on the ground that the verdict was against evidence (a).—The defendant is entitled to the verdict, for the plaintiff relied solely upon the excess, and he has not replied it. In 1 Wms. Saund. 300 h, note (q), it is laid down "that if the circum-

(a) The rule was granted on the second point, and was afterwards made absolute.

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stances are such that the excess does not make the defendant a trespasser ab initio, the plaintiff, instead of replying it, must new assign." [Parke, B.—The rule as to replying excess applies only to the old form of plea. This form is altogether a new one, and is given by the Common Law Procedure Act, 1852 (a). Martin, B.—The form was introduced to obviate the necessity of such a replication.]

PER CURIAM (b).—Upon this point there will be no rule. It is clear that to this plea the plaintiff was not bound to reply the excess.

Rule refused (c).

(a) 15 & 16 Vict. c. 76, Sched. B. 45.

(c) See *Cockcroft v. Smith*, 2 Salk. 642; and *Glover v. Dixon*, 9 Exch. 158.

(b) *Pollock*, C. B., *Parke*, B., and *Martin*, B.

May 1.

NORTHAM v. BOWDEN.

The plaintiff, under the license of the owner of the soil to search for tin ore, had, in searching for that mineral, made certain excavations in the soil. The defendant carted away some of the soil which

TROVER for sand, stone, gravel, and minerals.—Pleas, not guilty and not possessed,—on which issues were joined.

At the trial, before *Crowder*, J., at the last Bodmin Assizes, it appeared that the plaintiff had, by the license of one Rodd, the owner of the soil, dug certain pits in Trevague Common for the purpose of searching for tin. The license under which the plaintiff acted was at first by the plaintiff had so thrown out,—the plaintiff not having abandoned his right to search the soil thrown out for ore. In an action of trover for the removal of the soil:—*Held*, that the plaintiff had, as against the defendant, a mere wrongdoer, a sufficient possessory title to the mass thrown out to enable him to maintain the action.

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parol, but afterwards merged in a license by deed. The defendant, who, it was suggested, acted under the authority of one Archer, had taken away two or three cart loads of the soil which had been thrown out of the pits, which the plaintiff had excavated, for the purpose of making the search for the tin. It appeared that there was some tin in the sand and gravel which the defendant had removed.

On the part of the defendant, it was contended that the plaintiff had not such a possession of the soil which had been thrown out of the pits, and which the defendant had removed, as was sufficient to support an action of trover. The learned Judge left the case to the jury, who found a verdict for the plaintiff with 5s. damages, but his Lordship reserved leave to the defendant to move to set the verdict aside and enter a verdict for him.

Montague Smith moved accordingly (April 18), and contended that the plaintiff had not such a possession of the mass thrown out of the pit as would support the action, for that such portion of the soil as had been thrown up was not severed from the realty; and that the action should have been brought by the owner of the soil, whose title to the realty could not have been disputed.

Cur. adv. vult.

POLLOCK, C. B., now said—We are of opinion that there ought to be no rule in this case. It was an action of trover in respect of some ore mixed with gravel which had been dug out by the plaintiff under a license from the person claiming to be the owner of the soil. The defendant carted away two or three cart loads of this gravel. The real litigant parties were probably the persons who respectively claimed adversely the soil as against each other, although the actual parties on the field of battle were the plaintiff, who was licensed by one of them, and the defendant, who

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acted at the suggestion, though perhaps not under the direct authority, of the other party. The plaintiff relied merely on his possession, arising from his having dug the gravel and ore under a license from the owner of the soil, as against the defendant, who was a mere wrongdoer. Now the defendant, although he professed to have acted under the authority of some other person, instead of bringing forward the title of that party, rested his case upon a supposed defect in the plaintiff's title. Upon examining the case as reported to us by my learned Brother *Crowder*, it appears that the plaintiff had dug the gravel, in which there was also a quantity of ore; and one point was, whether there was ore of some value in the mass so carted away. The jury found that there was. Under these circumstances we are of opinion that the possessory right of the plaintiff was sufficiently made out to maintain an action of trover against the defendant who was a mere wrongdoer.

PARKE, B.—I think, as I observed at the time the motion was made, that the plaintiff was not only entitled to maintain the action in respect of the tin ore which was part of the mass thrown out, but also that he was entitled to succeed in respect of his possessory right in the sand and gravel, which, by permission of the owner of the soil, he was at liberty to examine for the purpose of separating the ore from it. I think he had a right to the entire mass as against a wrongdoer; and the defendant, not having proved his title, must be considered as such. The plaintiff's possessory right, therefore, not only applied to the tin as a part of it, but to the whole mass till he had abandoned it.

PLATT, B.—The plaintiff had reduced into his possession the whole mass of soil which he had thrown out of the pits, and by so doing he acquired a sufficient title to it as against a wrongdoer.

MARTIN, B.—I am of the same opinion. If the plaintiff had a right to the gravel and soil for the purpose of getting any mineral that could be found in it, he had such a possession of the whole as entitled him to maintain an action for its conversion against a wrongdoer.

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Rule refused.

JOHNSON v. DIAMOND.

May 2.

THIS was a proceeding under the 64th section of the Common Law Procedure Act, 1854.

The declaration was as follows (a):—P. N. Johnson, by J. E. F. his attorney, sues J. W. Diamond by a writ issued forth of this Court in these words:—Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to J. W. Diamond, of Hewton Beerferris, in the county of Devon: We command you, that, within eight days after the service of this writ upon you, inclusive of the day of such service, you appear in our Court of Exchequer of Pleas, to shew cause why P. N. Johnson should not have execution against you for

C., at the request of D., commenced an action (in which C. had no interest) against I., upon D. giving C. a bond, whereby D. bound himself to C., in the penal sum of 200*l.*, subject to the condition that, if D. should pay to I., the defendant in the action, such costs as C., the plaintiff in the action, should

in due course of law be liable to pay in case he should discontinue, become nonsuit, or a verdict should pass against him, such costs to be first taxed, or in case of a judgment obtained by the defendant for his costs of defence; and also should permit C., during the pendency of the action, or of any liability to him arising therefrom, to retain and apply any of D.'s monies that might come into C.'s hands towards the discharge of any costs or liabilities which C. might be put to or incur by reason of his permitting the action to be carried on in his name, or from any injury to him thereby from the default or omission of D. to pay the same, the bond should be void, &c. C. was nonsuited in the action, and I. had judgment to recover his costs:—*Held*, that D.'s liability under the bond to pay such costs did not constitute a "debt" within the garnishee clauses of the Common Law Procedure Act, 1854, and could not be attached as such by the judgment creditor.

(a) As the case is one of no-
velty, it has been thought expe-
dient to set out the declaration
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199*l.* 1*s.* 10*d.*, being part of the amount of a debt due from you to T. Courtis, to satisfy 199*l.* 1*s.* 10*d.*, which, on the 16th of June, 1854, the said P. N. Johnson, by a judgment of our Court of Exchequer of Pleas, recovered against the said T. Courtis, and for costs of suit in this behalf; and take notice, that, in default of your so doing, the said P. N. Johnson may proceed to execution.—Witness, Sir FREDERICK POLLOCK, Knight, at Westminster, the 3rd day of February, A.D. 1855. And the said J. W. Diamond has appeared to the said writ; and the said P. N. Johnson, by his attorney, afterwards says, that the said debt, due from the said J. W. Diamond to the said T. Courtis, accrued to him the said T. Courtis upon and by virtue of a certain bond, bearing date the 4th day of March, A.D. 1854, whereby the said J. W. Diamond became bound unto the said T. Courtis in the penal sum of 200*l.*, to be paid to the said Thomas Courtis, which said bond was and is subject to a certain condition thereunder written, whereby, after reciting that an action had been commenced and was then depending in her Majesty's Court of Exchequer of Pleas, wherein the said T. Courtis was plaintiff, and P. N. Johnson (the now plaintiff) was defendant; and further reciting, that the said T. Courtis was only the nominal plaintiff in the said action, the same having been brought at the request of the said J. W. Diamond; and that, in consideration of the said T. Courtis having allowed the said action to be brought in his name, and of his having agreed that the same should be continued until judgment was obtained therein, the said J. W. Diamond had agreed to indemnify the said T. Courtis in manner thereafter mentioned, the condition of the said bond was declared to be, that, if the said J. W. Diamond should pay or cause to be paid unto the defendant in the said action (meaning the now plaintiff) such costs as the said T. Courtis, as plaintiff in the said action, should in due course of law be liable to pay in case he should discontinue, become nonsuit, or a verdict

should pass against him in the said action, (such costs to be first taxed by one of the Masters in the usual manner), or in case of a judgment obtained by the said defendant in the said action for his costs of defence; and also should permit the said T. Courtis, during the pendency of the said action, or of any liability to him arising therefrom, to retain and apply any monies of the said J. W. Diamond that might be then or at any time thereafter in the hands of the said T. Courtis, for or towards the discharge of any costs or liabilities which the said T. Courtis might be put to or incur by reason of his permitting the said action to be brought and carried on in his name, or from any injury to him thereby from the default or omission of the said J. W. Diamond to pay the same, then the said bond should be void, otherwise should be and remain in full force and virtue: And the said P. N. Johnson says, that, after the making of the said bond, such proceedings were duly had in the said action in the said condition mentioned, wherein the said T. Courtis was plaintiff, and the now plaintiff was defendant; that afterwards, to wit, on the 16th of June, 1854, it was considered and adjudged by the said Court that the said T. Courtis (the plaintiff in the said action) should take nothing by his said writ, and that the defendant (the now plaintiff) should go thereof without day, &c.; and it was then further considered and adjudged, in and by the said Court, that the now plaintiff should recover against the said T. Courtis 199*l.* 1*s.* 10*d.* for his costs of defence, of all which said premises the said J. W. Diamond had notice, and was afterwards, to wit, on the day and year last aforesaid, and on divers other days and times between that day and the commencement of this suit, requested by the said T. Courtis to pay to the now plaintiff the said sum of 199*l.* 1*s.* 10*d.*, being the amount of costs recovered by him in the said action as aforesaid, and to indemnify him the said T. Courtis from and against the same, pursuant to the condition of the said bond: Yet the said J. W. Dia-

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mond did not nor would, when he was so requested as aforesaid, or at any other time, pay or cause to be paid to the now plaintiff the said sum of 199*l.* 1*s.* 10*d.*, or any part thereof, whereby the said bond became forfeited, and the said sum of 199*l.* 1*s.* 10*d.* then became due and payable from the said J. W. Diamond to the said T. Courtis; and the said P. N. Johnson prays that execution may be adjudged to him accordingly for the said sum of 199*l.* 1*s.* 10*d.*, and for costs of suit in this behalf.

Demurrer and joinder therein.

Kingdon in support of the demurrer.—The question is, whether the demand which the plaintiff seeks to recover from the defendant is a “debt,” as between the defendant and Courtis, within the meaning of the garnishee clauses of the Common Law Procedure Act, 1854. The 60th section enables a judgment creditor to obtain an order for the examination of the judgment debtor as to “what *debts* are owing to him.” The 61st section empowers a Judge, under certain circumstances, “to order that all *debts* owing or accruing from such third person, (hereinafter called the garnishee), to the judgment debtor shall be attached to answer the judgment debt.” The 64th section, upon which this proceeding is founded, empowers a Judge, where the garnishee disputes his liability, to “order that the judgment creditor shall be at liberty to proceed against the garnishee by writ, calling on him to shew cause why there should not be execution against him for the alleged debt.” It is submitted, that the liability of the present defendant under the bond is not a *debt* within the meaning of those clauses. This is not a common money bond, but one upon which it would be necessary to assign breaches under the 8 & 9 Will. 3, c. 11. The plaintiff would have judgment for the amount of the penalty, which would stand as a security for future breaches. An action against the obligor of the bond would be a proceeding

to recover damages, to be assessed by a jury. The obligee's claim cannot be called a *debt*, for it is as unliquidated as a claim by a vendor against a vendee for damages arising from not accepting the goods. If the action had been improperly released, the jury would not have given a large amount of damages. But if, on the other hand, Courtis had been taken in execution by reason of Diamond's not having fulfilled the condition of his bond by paying the amount due in proper time, a large amount of damages would probably be awarded. The second part of the condition of the bond clearly has reference to unliquidated damages only. And, moreover, this is not a *debt* due from Diamond to Courtis, for Diamond's obligation is to pay Johnson, and not Courtis. That class of authorities which have been decided upon the construction of the word "*debt*," as used in the Statutes of Set-off, 2 Geo. 2, c. 22, and 8 Geo. 2, c. 24, are in the defendant's favour. The Courts have always put a liberal interpretation upon those statutes. In *Morley v. Inglis* (a) the plaintiff guaranteed the defendant 1600*l.*, advanced by the defendant to one J. C. at the plaintiff's request, and also any further sums which might then or thereafter be owing from J. C. to the defendant. The defendant afterwards advanced to J. C. 3000*l.*, which sum, as well as the 1600*l.*, remained due at the time the plaintiff sued the defendant for a debt; and it was held, that the defendant could not set off the sum due to him from the plaintiff under the guarantee. In *Castelli v. Boddington* (b) it was held, that a set-off cannot be pleaded to an action for unliquidated damages: *Hardcastle v. Netherwood* (c) is to the same effect. And a set-off cannot be pleaded to an action of debt on bond conditioned for replacing stock: *Gillingham v. Waskett* (d). In *Collins v. Collins* (e) it was held, that a set-off might be pleaded to

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(a) 4 Bing. N. C. 58.

(b) 1 E. & B. 66.

(c) 5 B. & Ald. 93.

(d) M'Cl. 198.

(e) 2 Burr. 820.

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a bond for payment of an annuity; but that case seems to be overruled by *Attwooll v. Attwooll* (a), where *Crompton*, J., said, "I never could understand how, if such a case was within stat. 8 Geo. 2, c. 24, the judgment could be entered so as to permit the penalty to stand as a security for future breaches. The question was asked in *Collins v. Collins*, and Lord *Mansfield* answered it; but I never could understand the answer." The two Common Law Procedure Acts of 1852 and 1854 are Acts in *pari materia*, and should be read as one Act; and by the 96th section of the former, the provisions of the 8 & 9 Will. 3, c. 11, are not to be affected thereby. The object of the 8 & 9 Will. 3, c. 11, was to protect parties from being improperly made liable to the full extent of the penalties of their bonds. But if the present mode of proceeding were sanctioned, it would have the effect of repealing the 8 & 9 Will. 3, c. 11.—He also referred to *Lee v. Lester* (b), *Smart v. Lovick* (c), and *Bishop of London v. M'Neil* (d).

Maynard contra.—This is peculiarly a case to which the Common Law Procedure Act, 1854, ought to extend. It has been contended that this is not a debt, because certain proceedings are necessary to ascertain the amount to which the judgment creditor is entitled. But the amount would be ascertained by the taxation of the costs. The same reasoning as that adopted by the defendant would be applicable to support an argument that a claim for goods sold and delivered is not a debt. If a commission of bankruptcy had issued against Diamond, this claim would have been proveable under it, if taxation of costs had been made: *Hodgson v. Bell* (e), *Hankin v. Bennett* (f). [Parke, B.—There are two difficulties against which the plaintiff has to contend.

(a) 2 E. & B. 23.

(b) 7 C. B. 1008.

(c) 3 Dowl. P. C. 34.

(d) 9 Exch. 490.

(e) 7 T. R. 97.

(f) 8 Exch. 107.

In the first place, he must shew that this is a *debt*. Now it is merely a claim for an unliquidated amount, and it was never intended that the word "debt," as used in this Act, should be applicable to the case of a penalty. And secondly, this is not a debt due from the garnishee to the judgment debtor, but a mere bond of indemnity to protect him from the consequences of the suit.] *Carr v. Roberts* (a) is an authority that the amount which Courtis might recover from Diamond, in an action against him, is to be considered as liquidated. It appears from *Westoby v. Day* (b), that this is a claim which would be attachable according to the custom of London. [Parke, B.—It is clear that this claim could not be made the subject of a set-off in an action by Courtis against Diamond, for it is impossible to say how much is due under the bond. The amount recoverable is not liquidated. *Walker v. Broadhurst* (c), in which the same question came before the Court of Bankruptcy and this Court, is analogous to this case.]

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Kingdon was not called upon to reply.

PARKE, B.—I am of opinion that the garnishee clauses of the Common Law Procedure Act, 1854, do not extend to this case. It is a case which I should be inclined to view in the most favourable light for the plaintiff, as he is the very person to whom satisfaction is to be made; but the question is, whether this claim is a *debt* according to the true meaning of that word as used in the 61st, and the following sections of the Act which have reference to this matter. The words of the 61st section are, that in case "any other person is *indebted* to the judgment debtor, and is within the jurisdiction," it shall be lawful for a judge "to order that all *debts* owing or accruing from such third person to the judgment debtor shall be attached to answer

(a) 5 B. & Ad. 78.

(b) 2 E. & B. 605.

(c) 8 Exch. 889.

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the judgment debt." There must therefore be a *debt*; for it is perfectly clear that the legislature did not intend, by this enactment, to give the power of attaching causes of action for unliquidated damages or for personal injuries, but debts only. Then do these sections apply to a bond of this description? I am of opinion that they do not. Now the penalty of the bond stands only to secure the performance of the condition, and I agree that if the bond had been conditioned for the payment of a sum certain, or a sum capable of being ascertained without the intervention of a jury, the statute would apply; but in this case the amount of the defendant's liability must be assessed by a jury. A question has been raised, whether this is a debt within the Statutes of Set-off, and I quite agree that a debt which can be set off is capable of being attached under these clauses: but it is clear that the obligee of this bond could not have made it the subject of a set-off, for the obligor is not bound to pay a sum certain to him, but something to a stranger; and in case of the non-performance of the condition, the jury would have to assess the amount of damage which the obligee had sustained. In no sense, therefore, can it be considered as a bond to pay a sum of money to the obligee, and consequently it is not a debt which could be set off; and I think, that, if it is not a debt within the Statutes of Set-off, it cannot be attached. Besides this, there is a difficulty in seeing how the penalty of the bond is to be divided, so as to make part of it payable to the plaintiff and part to the obligee. In substance this is merely a bond of indemnity, and I am of opinion that the defendant is entitled to judgment.

PLATT, B.—I am of the same opinion. The facts are these:—Courtis was induced by Diamond to sue Johnson in an action in which Courtis had no interest, and this bond was given by Diamond to Courtis to protect him against the consequences of the suit. The action failed, and

Johnson had judgment for his costs. Now the bond provides that in that event Diamond shall pay to Johnson those costs, and the question is whether this bond can be said to be an instrument under which a debt is due to the judgment debtor, so as to be capable of being attached. I am of opinion that it is not. If the bond had been for the payment by Diamond to Courtis of a sum of money, there is no doubt that might have been attached by Johnson. But this is in no sense of the word a *debt* between Courtis and Diamond. It is a covenant by Diamond with Courtis to pay Johnson the amount of his costs. If there is a debt at all, it is a debt to Johnson. It is not, however, a debt, but merely a covenant to indemnify. It was contended that this might be considered a debt, as judgment would be signed for the amount of the costs, but that argument would be applicable to all cases where a sum of money is ultimately recoverable. It is perfectly plain that this is not a covenant to pay Courtis a sum of money, but a mere indemnity to relieve him from these costs. The plaintiff therefore is not entitled to recover: at the same time, I must express my regret that the legal forms of proceedings do not give him that right.

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MARTIN, B.—I am inclined to give the utmost possible scope to the provisions of the Common Law Procedure Acts; but I am clearly of opinion that this is not a *debt* within the meaning of the 61st section. It is not contended that the penalty of the bond is a debt which could be attached, and this is a bond upon which it would be necessary to assign breaches under the 8 & 9 Will. 3, c. 11. The real liability of the defendant under this instrument is this: It is a contract by which he is bound to pay such costs as Courtis, the judgment debtor, shall in the course of law become liable to pay to Johnson. It is an abuse of language to call such liability a debt. It is a contract to pay a sum

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of money, when the amount is ascertained, to a third person. That is not a debt within the true meaning of the clause in question. I think the decisions upon the statutes of set-off afford a very good analogy for the construction of this statute. The cases cited by Mr. *Kingdon* are direct authorities that in an action by the garnishee against Courtis for a debt, this claim could not have been set off; and I am of opinion that that which cannot be set off cannot be considered as a debt capable of being attached. I concur in the observations of my Brother *Parke*, and agree that our judgment must be for the defendant.

Judgment for the defendant.

May 8.

MORGAN v. TARTE.

Where a cause is referred to arbitration without power of amendment, a judge has no power, except by consent of the parties, to order the particulars of demands specially indorsed on the writ, to be altered by increasing the amount of one of the items.

THIS was a rule calling on the plaintiff to shew cause why an order of *Jervis*, C. J., should not be set aside. It appeared that, after action brought and before declaration, the cause was referred by consent of the parties and by the order of a judge to an arbitrator. The action was for services performed and work done by the plaintiff as an architect. The writ was specially indorsed, and the last item in the particulars of demand was as follows:—

“To cash expended for advertisements, travelling expenses, and sundry petty disbursements,”—20*l*.

Particulars of demand and a notice requiring payment, under the Bankrupt Law Consolidation Act, 1849, Sched. (G.), had been delivered to the defendant, and these particulars contained the same items as those indorsed on the writ of summons. An order was obtained from the

Lord Chief Justice of the Common Pleas, giving the plaintiff liberty to amend the special indorsement on the writ of summons, by adding 13*l.* 3*s.* 5*d.* to the last item in the special indorsement.

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Hannen shewed cause (May 7).—It may be admitted that the particulars of demand cannot be altered by the introduction of an entirely new item, as, for instance, in particulars for work and labour, an item, for money lent, cannot be inserted; but in this case there is only the substitution of 33*l.* 3*s.* 5*d.* for 20*l.* [*Willes*, amicus curiæ, referred to a case of *Pauling v. The Mayor of Dover* (a), decided upon the last day of last Michaelmas Term, in which the Court intimated an opinion that they had no power to amend the particulars of demand specially indorsed on the writ, after the cause had been referred.] The altered item is a matter in the cause. [*Parke*, B.—A new item has been introduced which would enable the plaintiff to recover more than he would be entitled to do under the original state of the particulars. That cannot be done except by the consent of both parties.] In *Hurst v. Watkis* (b), Lord *Ellenborough*, C. J., held, that although the plaintiff, after delivering a particular of his demand, cannot at the trial himself give evidence out of it, yet if the defendant's evidence shews that there were other items which he might have included in his demand, he is entitled to recover all that appears to be due to him. *Fisher v. Wainwright* (c) is to the same effect. There are authorities which shew that although a plaintiff may on his own evidence, from the form of the particulars of demand, be restricted from recovering for a particular matter, yet, inasmuch as he may recover it on the defendant's evidence, such matter is a matter in the cause. In *Blunt v. Cooke* (d) the Court allowed

(a) Not reported on this point.

(c) 1 M. & W. 480.

(b) 1 Camp. 68.

(d) 5 Scott N. R. 232.

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an amendment of this description: *Tindal*, C. J., there said, "There certainly is more difficulty in allowing an amendment of this sort after a reference of the cause, than in an ordinary case, for the reason already suggested, viz., that the defendant might possibly have withheld his consent to refer if the particulars originally delivered had contained the items now sought to be added; in which case probably it would be but just that he should have the option of being restored to his former position. The defendant, however, has not in this case suggested that difficulty; and therefore, inasmuch as the bill of particulars forms no part of the record, but is rather the creature of the Court, I think the amendment may be made on payment of costs. At *Nisi Prius* the case would be different, for there the cause must proceed, and the defendant would have a right to complain of new items being put upon him which he could by no possibility be prepared to answer." And *Maule*, J., said, "If it could be suggested that the proposed amendment would impose any real difficulty or hardship on the defendant, or that he would be under the necessity of pleading *de novo*, or the like, there might be good reason for withholding the amendment. But nothing of the sort being shewn, I think the rule may be made absolute on payment of costs."

Keane was not called upon to support the rule.

POLLOCK, C. B.—We are all agreed that the learned Judge had no power to make the amendment without the consent of the parties, and therefore the order of reference and the order of amendment cannot both stand. If the plaintiff chooses to proceed with the reference, this order must be rescinded; but if he is desirous of obtaining the benefit of an amendment, he may abandon the reference: for it is clear that he ought not to be restricted by the original state of the particulars from recovering the amount

by which the particular item is increased by the order of the learned Judge.

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PARKE, B., and PLATT, B., concurred.

The plaintiff electing to proceed with the reference, on the following day (May 8) the Court said that the rule must be absolute.

Rule absolute.

BUTLER v. MEREDITH.

May 8.

THIS was an action of ejectment, under the provisions of the 15 & 16 Vict. c. 76, to recover possession of certain premises in Bermondsey. The writ was issued in February last, and on the 13th of March, Pedro de Palacio and I. P. de Palacio, who were not named in the writ, and were foreigners residing in Spain, and out of the jurisdiction of this Court, obtained leave under the 172nd section of the Act to come in and defend as landlords. On the 28th of April the plaintiff obtained an order of *Coleridge, J.*, requiring these parties to give security for costs within five days, and, in default thereof, the appearance so entered was to be set aside, and judgment was to be signed for the plaintiff. On the same day an appointment was made between their attorney and the plaintiff's attorney, to settle

In an action of ejectment under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), a landlord, on complying with the requisites of the 172nd section, which enacts, that "any person not named in such writ shall, by leave of the Court or a Judge, be allowed to appear and defend, on filing an affidavit shewing that he is in possession of the land either by himself or by his tenant," is entitled, as a matter of right, to be let in to defend, and the Court or a Judge have no power in the case of a landlord residing out of the jurisdiction to impose upon him the condition of finding security for costs: per *Pollock, C. B., Platt, B., and Martin, B. Parke, B.*, dubitante, being of opinion that the Court or Judge have a discretion in the matter, where the landlord applies to defend as sole defendant and not as a defendant with the tenant in possession.

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the amount of security before the Master, which was done, and the amount of the security was fixed at 200*l*. The plaintiff afterwards gave notice of trial; and, on the 1st of May a summons was taken out before *Alderson*, B., at Chambers, to enlarge the order of *Coleridge*, J.; which the learned Judge refused to do, on the ground that his learned Brother *Coleridge* had no power to make the order.

Wilde (May 7) moved for a rule, calling on the plaintiff to shew cause why the order of *Coleridge*, J., should not be rescinded.—The learned Judge had no power to impose the condition contained in the order requiring these parties to give security for costs. There is no direct authority upon the point. In *Doe d. Hudson v. Jameson* (a), which was heard before Lord *Tenterden*, C. J., and *Parke*, J., those learned Judges required a party resident abroad, upon being admitted to defend an ejectment as landlord, to give security for costs. Lord *Tenterden*, C. J., said, "This is a very reasonable application;" and *Parke*, J., added, "The statute merely says, that it shall and may be lawful for the landlord to defend." The correctness of that decision is not disputed, if treated as applicable to the state of the law as it then stood, when the action of ejectment was the creature of the Courts. But the practice and proceedings in the action are now regulated by statute. Independently of that case, an application for liberty to impose such a condition upon a *defendant* is new. The 168th section of the 15 & 16 Vict. c. 76, enacts, that, "instead of the present proceeding by ejectment, a writ shall be issued directed to the persons in possession by name, and to all persons entitled to defend the possession of the property claimed, which property shall be described in the writ, with reasonable certainty." And the 172nd section enacts, that "any other person not named in such writ shall, by leave of the Court

(a) 4 M. & R. 570.

or a Judge, be allowed to appear and defend, on filing an affidavit shewing that he is in possession of the land either by himself or his tenant." Now these landlords have complied with the requisites of this section. The cases in which a party to the suit has been required to give security for costs, are those where such party was either the plaintiff or practically the plaintiff. In *Selby v. Cruchley (a)*, a defendant in *replevin* residing out of the jurisdiction of the Court was required to give security for costs. But the Court there said, that "there is no principle on which the defendant in *replevin*, as to this matter at least, can be distinguished from an ordinary plaintiff." Tidd, *Prac.*, 9th edit., 534, may also be referred to. In *Baxter v. Morgan (b)*, the Court refused to compel a defendant resident abroad to give security for costs, as the price of compelling the plaintiff resident abroad to give the defendant security for costs. And, in *Hiskett v. Biddle (c)*, the Court refused an application requiring security for costs from a defendant in *replevin*, on the ground of his poverty. Upon the words of this statute, therefore, the Court will not require such security from a defendant, though a foreigner, who by such proceedings may be altogether barred of his title to the land.

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Garth shewed cause in the first instance.—If the learned Judge had power to make the order, and the question is whether his discretion was properly exercised, this application is too late, as the parties making it acquiesced in the order. *Doe d. Hudson v. Jameson* is an authority, that the Judge had the power. That decision proceeded on the 11 Geo. 2, c. 19, s. 13, which enacts, that "it shall and may be lawful for the Court where such ejectment shall be brought, to suffer the landlord or landlords to make him, her, or themselves defendant or defendants by joining with the tenant or tenants to whom such declaration in ejectment

(a) 1 B. & B. 505. (b) 6 Taunt. 379. (c) 3 Dowl. P. C. 634.

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shall be delivered, in case he or they shall appear; but, in case such tenant or tenants shall refuse or neglect to appear, judgment shall be signed against the casual ejector for want of such appearance; but, if the landlord or landlords of any part of the lands, tenements, or hereditaments, for which such ejectment was brought, shall desire to appear by himself or themselves, and consent to enter into the like rule that, by the course of the Court, the tenant in possession, in case he or she had appeared, ought to have done, then the Court where such ejectment shall be brought, shall and may permit such landlord or landlords so to do, and order a stay of execution upon such judgment against the casual ejector, until they shall make further order therein." This provision is in effect re-enacted by the 172nd section of the 15 & 16 Vict. c. 76, which was not intended to alter, but merely to simplify the proceedings in ejectment: *Hutchinson v. Greenwood* (a). The 221st section strengthens this view. It enacts, that "the several Courts and the Judges thereof respectively shall and may exercise over the proceedings the like jurisdiction as heretofore exercised in the action of ejectment, so as to insure a trial of the title, and of actual ouster when necessary only, and for all other purposes for which such jurisdiction may at present be exercised, and the provisions of all statutes not inconsistent with the provisions of this Act, and which may be applicable to the altered mode of proceeding, shall remain in force and be applied thereto." The plaintiff is placed in an unfair position, by having to proceed without security for costs, as, in case of success, he may be unable to recover the costs to which he has been put by these defendants. If it be the practice to require security from a plaintiff, it seems but reasonable, by analogy, that a *defendant* should find security also. [*Pollock*. C. B.—The case cannot be rested on analogy, for the proceedings are merely stayed where the

(a) 4 E. & B. 324.

plaintiff sets the law in motion; but a defendant may be barred of his rights.] The judgment in ejectment is not rendered conclusive by this statute, for the 207th section enacts, that "the effect of a judgment in an action of ejectment under this Act shall be the same as that of a judgment in the action of ejectment heretofore used." These defendants, therefore, would not be precluded from trying their rights to this land in a fresh action.

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Wilde was heard in support of the rule. [*Parke*, B., referred to the judgment of *Wilmot*, J., in *Fairclaim v. Shamtitle* (a).]

Cur. adv. vult.

POLLOCK, C. B., now said.—This was a rule to shew cause why an order of my Brother *Coleridge*, requiring two defendants in ejectment to give security for costs, should not be set aside. In shewing cause against the rule, a case of *Hudson v. Jameson* (b) was mainly relied on. [His Lordship read the report of that case, and proceeded:—] I think that this rule ought to be made absolute. Under the new order of things, which the 15 & 16 Vict. c. 76 has introduced, the action of ejectment is placed by that statute on the same footing as when it existed as the mere creature of the Court. Now, it is to be observed, that, according to this statute, a landlord is to be at liberty to come in and defend, upon filing an affidavit that he is in possession of the land either by himself or his tenant; and that, although provision is made for striking out appearances by certain defendants, the statute does not provide for striking out an appearance by a person who has satisfied the Court or a Judge that he is in possession as landlord, either by himself or others. It was contended in support of the rule, that there is a distinction between the state

(a) 3 Burr. 1302.

(b) 4 M. & R. 570.

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of things which existed before the statute, and since it has given to the action of ejectment a statutable form, and not left it the mere creature of the Court. But, in answer to that position, it was said, that the 221st section of the Act provides, that the Courts and Judges shall have the same power over matters in reference to the action of ejectment as they had before. It, however, appears to me, independently of this, that it was intended that all landlords should be placed in the same situation. The statute makes no distinction between a landlord who is actually in possession, and one who is in possession by his tenant; and I think that we ought to construe the statute, and to administer the practice that may arise under it, so as to make no distinction where the statute itself does not make any; and I own that this consideration has had much force in leading me to the conclusion at which I have arrived. In the case of a landlord in actual personal possession, and called upon by an action of ejectment to defend his title, the Court indisputably has no power to require him to give security for costs. Why, then, should a landlord, who is in possession by his tenant, be called upon to give security? It is perfectly clear to me, that the statute intended that, whether a landlord is in possession by his own personal and actual possession, or by that of his tenant, he should be allowed to come in and defend simply on satisfying the Court or a Judge that he has the possession. In this case, it appears that the landlord is not actually in possession, but that he is so by his tenant. I think that, in such a case, he has as much a right to come in and defend his property as if he were personally in possession; and it was admitted on all hands, that then the Court could not interfere to require him to give security for costs. I am not aware of any case upon this subject, except that of *Doe d. Hudson v. Jameson*; that, however, was under the old law, and such a practice would certainly lead to much inconvenience. It was admitted that there is a wide difference between a

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person's having to defend an action of ejectment, and being called upon as plaintiff to establish his title. Mr. Garth's argument was, that, if the defendant cannot give security, he may lose his possession, and the plaintiff may recover, but that the defendant does not lose his right, as the old action of ejectment was not like an ordinary action, where the parties are concluded by the result of the trial; and, that the 207th section of the statute gives to a judgment in an action of ejectment the same effect as it had before, viz. that of determining the right to the possession of the land, but not the title to it; and consequently that a defendant so turned out of possession may bring a fresh action, and recover the property. But that might make all the difference. A man's title may depend entirely upon his possession, and he may be unable, if once turned out of possession, to shew such a title as would justify him in bringing an action to recover back the land;—to say nothing of the additional expense, trouble, and anxiety that might be cast upon him. It seems to me, therefore, that we ought to construe the provisions of the Act in such a way as to give full effect to it. Whether or no the Act was intended to create the difference for which Mr. Wilde contended, namely, absolutely to entitle a landlord to come in and defend, so as to make the order of my Brother Coleridge a nullity, I do not pretend to say. It may be, that the matter was not adverted to at the time the Act passed; but, I am quite sure of this, that it was not intended by the legislature, in passing that Act, to put a landlord, who is in possession by his tenant, in a different position from a landlord in actual and personal possession. On this short ground, it appears to me, that we ought so to construe the Act, notwithstanding the case of *Doe d. Hudson v. Jameson*, which was decided at a time when the action of ejectment was purely the creature of the Courts. I am not aware that that decision has ever since been acted upon, so as to have had the attention of the Courts called to it. Moreover

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the case was not fully argued, and the reasons of the Judges are exceedingly short; and, in the present state of the law, I do not feel myself bound by it.

PARKE, B.—I feel satisfied that the position of parties under the 15 & 16 Vict. c. 76, is exactly the same as it was before, and at the time the case of *Doe d. Hudson v. Jameson* was decided; and that the Act makes no difference with respect to the landlord's right to come in and defend, or the discretion of the Court or a Judge to grant or refuse leave for that purpose; and my opinion is, (notwithstanding what has been said by my Lord Chief Baron), that there is such a discretion, and that we should not be exercising our discretion improperly in this case if we were to follow that of *Doe d. Hudson v. Jameson*. I do not mean that the Court or a Judge have a discretion to prevent the landlord joining with the tenant, which he had a right to do by the practice of the Courts before the 11 Geo. 2, c. 19, s. 13; but that they have a discretion in allowing him to become the *sole* defendant. Where the plaintiff sues the person in possession, that is to say, a party who is liable to the plaintiff for costs unless some other person who is liable be substituted in his place, and no third party comes in to defend, then the plaintiff tries the question with the tenant in possession, at the peril of the tenant having to pay the costs in case of the plaintiff being successful. I therefore thought, at the time *Doe d. Hudson v. Jameson* was before the Court of King's Bench, that where a person applies to be let in as sole defendant, —not joining with the tenant in possession, but putting himself in the place of the tenant and thereby introducing a new person to litigate the title;—it was a very reasonable condition to impose upon a foreigner, who was not within the jurisdiction of the Court, that, in case he should be defeated in the action, he should pay the costs. That was so decided by Lord *Tenterden* and myself, who were the only Judges then present. The report of the case is very short, and on

referring to my own notes, it appears to have passed with very little notice, as I find nothing to indicate that there was much argument upon the point. The alterations effected by the 11 Geo. 2, c. 19, and followed by the 15 & 16 Vict. c. 76, seem to me to leave it still in the discretion of the Court or a Judge to grant or refuse the application of the landlord to be admitted to defend *alone*. It appears from the authorities cited by my Brother *Adams* in his work on Ejectment, at p. 215, that at common law, ever since the invention of the action of ejectment, it was the practice of the Courts to permit the landlord to come in and defend with the tenant. That is so stated in the case, cited by me on the argument, of *Fairclaim d. Fowler v. Shamtitle* (a), where *Wilmot, J.*, expressed an opinion, that, before the statute was made upon the subject, landlords might be let in to defend without joining the tenant in possession. Upon reference to my Brother *Adams's* work, at p. 215, that appears to have been a doubtful matter, and he suggests that the 11 Geo. 2, c. 19, s. 13, was introduced for the purpose of correcting any former difference of opinion upon that subject, by allowing the landlord to defend either with or without the tenant, and that such was the reason of passing the statute, which *Wilmot, J.* said was altogether unnecessary. It seems rather doubtful, whether his opinion was correct, for the 13th sect. of the 11 Geo. 2, c. 19, gave the Court powers which it did not previously possess. Now that section enacts as follows:—[His Lordship read it, and proceeded.] The language of the section is, “that it shall and may be,” and I consider the words “shall and may” as most certainly discretionary. Now, as this in my opinion is a discretionary matter, the only remaining question is, to what extent the discretion is to be limited? I think that there is no difference between the 11 Geo. 2, c. 19, and the 15 & 16 Vict. c. 76, except that the latter statute gives to the

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(a) 2 Burr. 1302.

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Court or a Judge that power which the former statute gave to the Court alone; and also, that, by section 168, the writ, instead of being directed to the nominal defendant as formerly, is now to be directed to all persons in possession by name, and to all persons entitled to defend, not named. Now, the right of persons not named in the writ to defend the possession, depends on the 172nd section of the 15 & 16 Vict. c. 76, which enacts, that "any other person not named in such writ shall, by leave of the Court or a Judge, be allowed to appear and defend, on filing an affidavit shewing that he is in possession of the land either by himself or his tenant." That section requires that leave of the Court or a Judge shall be obtained; and I consider that there ought to be a discretion exercised by the Court or Judge in granting such permission. The 176th section, which empowers the Courts to "strike out or confine appearances or defences set up by persons not in possession, either by themselves or their tenants," seems to me not to take away such discretion; for the 221st section, which preserves to the Courts and Judges that jurisdiction over proceedings in ejectment which they previously had, enacts, that "the provisions of all statutes not inconsistent with the provisions of this Act, and which may be applicable to the altered mode of proceeding, shall remain in force and be applied thereto." It, therefore, seems to me that the present Act, by that clause, puts the action of ejectment in all respects exactly on the same footing as it was before; and that if a landlord chooses to defend by his tenant, he may do so; but, that, if he seeks to defend alone, it is not at all an improper condition to impose on him, that he shall give security for costs; and, I think that such discretion is not to be confined simply to the fact of its being satisfactorily shewn that the party is landlord; for, if he is not, he cannot come in to defend. Therefore, if the case depended on me, I should hold that the power existed.

PLATT, B.—The opinions expressed by my Brothers *Cole-ridge* and *Parke* certainly lead me to doubt the accuracy of my own, which is opposed to theirs; but having considered the question, and having read these different clauses of the Act, and also that portion of the schedule which is applicable to the case, I cannot doubt that this rule ought to be made absolute. Anciently the action of ejectment was a fiction, and it was generally brought to insert upon the record the title of a landlord. The party claiming the land took another on the land and executed to him a lease; the person in possession of the land turned off the lessee, and then the latter preferred his complaint that the claimant had made a lease to him for a certain period of time, under which he had entered, and that he was ousted, and thereupon he sought the intervention of the Court to put him again into possession. Now that was the landlord's action, for on the face of it the plaintiff's title was the landlord's title. But as the party who had turned out the person to whom the lease was granted might be a tenant only, it was very reasonable that his landlord should be allowed to come in and defend, in order that the two parties claiming as landlord might contest the title. The cumbrous machinery of going on the land, of executing a lease, and going through the form of an ouster, was afterwards discontinued; and the name of John Doe, or some other fictitious name, was adopted, and the party upon whom the declaration was served (which operated as a writ) received a notice appended to it, that unless he came in and defended his title he would be turned out of possession. But in order to come in he was obliged to confess lease, entry, and ouster, and then the question was confined to the title. Such was anciently the state of proceedings in an action of ejectment. But now the action of ejectment is wholly the creature of the statute, and the Act prescribes the process and course of proceeding. The process, which is given in the form in Sched. (A.) No. 13, is as follows:—

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"Victoria, &c. To X. Y. Z. and all persons entitled to defend the possession," &c. In my opinion no one has a better right to defend the possession than the landlord. And the 172nd section, by which the landlord is so entitled, enacts that "any other person not named in such writ shall, by leave of the Court or a Judge, be allowed to appear and defend, on filing an affidavit shewing that he is in possession of the land either by himself or his tenant;" therefore the party who is pointed out as the party "in possession of the land" is the landlord, who is in possession by his tenant, as well as the tenant who is in actual possession at the time. It appears to me perfectly clear that this Act of Parliament intended that the landlord should have the right to come in and defend, provided he made out that he was entitled to the possession. But it is said that this section gives a discretion to the Court or a Judge. I deny that a discretion is given except within certain limits. The section says, that the landlord "shall by leave of the Court or a Judge, be allowed to appear and defend, on filing an affidavit shewing that he is in possession of the land either by himself or his tenant." Now the Court or a Judge has a discretion to this extent,—it is not sufficient merely to file an affidavit, which may be colourable, but the party must *satisfy* the Judge that he is in actual possession by his tenant before he can be allowed to come in; but when he has done that, the leave and order of the Judge ought, as a matter of course, to be granted to him. It seems to me that, if he makes a sufficient affidavit, he has an unqualified right under this statute to come in and defend his title. I am fortified in this opinion by the 176th section, which enacts, that parties coming in to defend an ejectment may have their names struck out by the Court or a Judge, but this is only when they are not in possession by themselves or tenants. Does not that shew to what extent the discretion is to be exercised? It excludes all such as cannot state with truth that they are in possession by their tenants.

Certain cases were cited upon this subject; but I consider that these cases, decided on a different state of the law, cannot govern us in the construction of a plain Act of Parliament, when we see by the statute itself and the form of the writ what the proceeding is and what the rights of the landlord are. It is therefore unnecessary to discuss the merits of the decision in *Doe d. Hudson v. Jameson*, though perhaps I might not agree with it. I consider that we are bound to construe this Act of Parliament, (which, fortunately, differs from most other Acts in being exceedingly plain), without involving ourselves in any difficulty which is not presented by the Act itself. Let us consider what is the condition of these parties. The tenant of a landlord living abroad is assailed by an ejectment, but the tenant perhaps may not defend; and is the landlord to lose his land unless he gives security for costs? I can understand why security for costs should be required from a party setting the law in motion, where such party is out of the jurisdiction of the Court, or in a case where assignees sue in the name of an insolvent plaintiff for the purpose of their own benefit. The rule applies to parties who are plaintiffs, and to defendants in replevin, who are plaintiffs in fact, because they assert a right to distrain, for in replevin the goods are given up on the plaintiff entering into a replevin bond, whereby he is bound to bring an action to try the right of distress, and therefore, in truth, both parties may be said to be plaintiff,—the one who is nominally the plaintiff and he that made the distress; and indeed the latter is so treated by the 17 Car. 2, c. 7, by which, if he succeeds, he is entitled, (in addition to his right at common law to a return of the goods), to an assessment of damages and a valuation of the goods, by which he is recouped for his expenses, and he is secured by the bond. Consequently a defendant in replevin is very differently situated to any other defendant. But is it to be said that because a landlord does not reside in this country, and his tenant does not

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choose to defend his possession, he is to lose his estate if he cannot give security for costs? That is a monstrous proposition, and one which acted on would render the law a nuisance, for a landlord might be at the extremity of Africa, and possession might be taken of his property in his absence, merely because he had not given security for costs. Here the parties have been admitted to defend, and what right is there to displace them? The 176th section of the statute limits the power of the Court or Judge to strike out a party's name to cases falling within the category of "persons not in possession by themselves or their tenants." For these two reasons I think the rule should be absolute: first, the order of my Brother *Coleridge* ought never to have been made; and, secondly, these parties have been admitted to defend—the latter consideration increases the difficulty.

MARTIN, B.—I am also of opinion that this rule ought to be absolute, as I consider that the learned Judge had no power to make the order. The question depends on whether a landlord is entitled to appear and defend an ejectment, as a matter of right. I am of opinion that he is. It seems to me that the 15 & 16 Vict. c. 76, gives him that right, and that the Court or a Judge is bound, on being satisfied that he is the landlord of the premises, to allow him to come in and defend, by virtue of the 172nd section. I do not complain of the decision of the Court of King's Bench in *Doe d. Hudson v. Jameson*, for in the then state of the law it may have been discretionary with the Court to allow a landlord to defend or not; but I think that by the law as it now stands, it is not competent for the Court or a Judge to impose any terms on a landlord, and that he has a right *unconditionally* to come in and defend. Let us then look at the enactments of this statute which have reference to this question. The 168th section, which is the first of the series connected with ejectments,

enacts that "Instead of the present proceeding by ejectment, a writ shall be issued directed to the persons in possession by name and to all persons entitled to defend the possession of the property claimed." Therefore, in the very first section on the subject, the direction is that all persons who are in possession shall be named in the writ, but the statute also contemplates other persons not named who are entitled to defend. The 171st section enacts, that "the persons named as defendants in such writ, or either of them, shall be allowed to appear within the time appointed;" and the 172nd section enacts that "any other person not named in such writ shall, by leave of the Court or a Judge, be allowed to appear and defend on filing an affidavit shewing that he is in possession of the land either by himself or his tenant." Now it seems to me impossible that language could be used more clearly obligatory on the Court or a Judge to admit a person to appear and defend, if he satisfies them by affidavit that he is in possession either by himself or his tenant. The 176th section supports this view, for the Court or a Judge is thereby empowered to strike out or confirm appearances and defences "set up by persons not in possession by themselves or their tenants." So that, if a person is in possession by his tenant, the Court or a Judge has no right to interfere under the 176th section. I apprehend, therefore, that if a landlord has the right, which it seems to me he has, namely, an absolute right to appear and defend, it is not competent for the Court or a Judge to impose any condition upon him. But it was said, that this is a matter of little importance, and that the only consequence would be, that though a person abroad might be turned out of possession, yet he could himself bring an action of ejectment, and so recover back the possession. It seems to me, that a more mistaken view of the law could not possibly be submitted to a Court. A great number of the titles of persons in this kingdom depend upon their being in possession. The rule of law casts upon the plaintiff in ejectment

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the burden of making out his title, and many persons' titles are perfectly unassailable merely because they are in possession; but, if once out of possession, they might never be able to recover back their property. So far, therefore, from the circumstance of a person being turned out of possession being a matter of little importance, it is of the utmost importance to the security of landed property that persons should not be turned out of possession unless some clear proof is given against them, upon which the person claiming succeeds.

Rule absolute.

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IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer.)

GRAHAM and Another, Assignees of G. ROUGEMONT, a
Bankrupt v. THE VAN DIEMEN'S LAND COMPANY.

May 3.

BILL of Exceptions.—The declaration stated, that, by an Act of Parliament passed in the year 1825 (a), and before the said bankruptcy, it was enacted, that, in case the then King should, within three years after the passing of that Act, by charter grant that the persons therein named should be a body politic and corporate, by the name of "The Van Diemen's Land Company," they should have the powers therein named. And it was also enacted, that the shares in the capital stock of the said company, and in the profits and advantages thereof, should be and be deemed personal estate, and as such personal estate should be transmissible accordingly. [The enactment went on to provide, that the

In November, 1847, R., being owner of 157 shares of 100*l.* each, in an incorporated company, became bankrupt. Only 25*l.* per share had been paid. At the time of the bankruptcy, the bankrupt delivered the certificates of the shares to the official assignee. At that time the shares were of

no value. In June, 1849, notice was given to the official assignee of a call of 1*l.* per share, which he was requested to pay. Nothing further was done by the company or the assignees until February, 1853, when the shares having become valuable, the assignees claimed to be registered in the company's books as the owners of them, and offered to pay whatever was due for calls. In answer to their application, they received a letter from the secretary of the company, stating that there were no shares standing in the registry-book in the name of the bankrupt:—*Held*, that, assuming it was necessary that the assignees should, within a reasonable time, do some act to signify their acceptance of the shares, the question of reasonable time was one for the jury; but that a reasonable time would not begin to run until some one interested in the matter took some step in respect of it.

(a) 6 Geo. 4, c. 39.

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names of the shareholders, and the numbers of the shares should be entered in a book; and that a certificate under the seal of the company and countersigned by the clerk, should be delivered to every proprietor, specifying the share to which he was entitled, and that such certificate should be evidence of title to the shares.] And it was recited (a), that, in cases where the holder or proprietor of any one or more share or shares in the capital stock of the company, should become bankrupt, it might not be in the power of the company to know who was or were the proprietor or proprietors of such share or shares; and it was therefore enacted, that, in such case, where the right and property in one or more share or shares in the capital stock of the company should pass from the original subscriber or subscribers, or any proprietor or proprietors thereof, to any other person or persons, by any other legal means than by transfer or conveyance in the form pointed out in the Act, an affidavit should be made as therein mentioned, stating the manner in which such share or shares had passed to such other person or persons, and that such affidavit should be delivered to the clerk for the time being of the company, to the intent that he might enter and register the name or names of such proprietor or proprietors in the registry book or list of subscribers and proprietors to be kept in the office of the company.—[Averment: that, within three years of the passing of the said Act, and before the said bankruptcy, the company was incorporated by the name of "The Van Diemen's Land Company."—And it was by the said Act further enacted (b), that, if any subscriber or any proprietor or proprietors of any share or shares in the capital stock of the said company, his, her, or their executors, &c., should neglect or refuse to pay his, her, or their part or portion of the money to be called for by the directors, during the space of three calendar months next after the time appointed for payment thereof, together with lawful interest from the appointed time of payment, then

(a) Sect. 12.

(b) Sect. 14.

and in every such case such person or persons so neglecting or refusing should absolutely forfeit all his, her, or their share or shares in the capital stock of the company, and all profits and advantages thereof, and all money theretofore advanced by him, her, or them on account thereof, to and for the use and benefit of the company; but, that no advantage should be taken of such forfeiture of any share or shares until after thirty days' notice should have been given by the directors of the company, under the hand of the clerk of the company, to the owner or owners thereof, by notice in writing left at his, her, or their usual or last place of abode.—Averments: that the bankrupt, before and at the time of his bankruptcy, was the holder and proprietor of 157 shares in the capital stock of the company, of the value of 15,700*l.*, and was duly entered, with the number and proper numbers of such shares, as such holder and proprietor, in the books of the company; and that on such bankruptcy the plaintiffs, as such assignees as aforesaid, became and were entitled to the said shares and the owners thereof, of which the defendants then had notice: and the defendants, after the said bankruptcy, with knowledge of the same, and whilst the plaintiffs were the owners of the said shares, omitting and refusing to cause an affidavit to be made and delivered to the clerk of the company, to the intent that he might enter and register the names of the plaintiffs as such proprietors of the said shares, pursuant to the said Act, at a general meeting declared the said shares to be forfeited: that the said shares having passed from the original subscriber as aforesaid to the plaintiffs, as such assignees, by other legal means than the transfer or conveyance in the form pointed out by the said Act, that is, by virtue of the bankrupt law, an affidavit was made at the instance of the plaintiffs in manner and form as in the Act mentioned, stating the manner in which such shares had passed to the plaintiffs, which affidavit was delivered to the clerk for the time being of the said company, to the intent that he might

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enter and register the names of the plaintiffs as such proprietors in the registry book or list of subscribers, &c.; and the defendants were then requested (and a reasonable time after such request and before the commencement of this suit has elapsed,) to register the names of the plaintiffs as such proprietors as aforesaid: and the defendants had notice of the said bankruptcy before they declared the said shares forfeited, and that the plaintiffs, by virtue thereof, had become and were owners of the said shares; and, although the defendants also had notice of the said affidavit and other the premises hereinbefore set forth before the commencement of this suit, and although thirty days notice had not been given by the directors of the company under the hand of the clerk of the company to the plaintiffs, the owners of the said shares, by notice in writing left at their usual or last place of abode, in the manner and form required by the said Act; yet the defendants have taken advantage of such forfeiture among other respects in this, that, relying on the said forfeiture, they have refused, and still refuse, on demand made by the plaintiffs for that purpose, to enter or register them as the owners of the said shares, or to recognise them as such owners; and also in this, that, relying on the said forfeiture, they have refused, and still refuse, to receive the amount of all monies for calls, or otherwise, due or payable from the bankrupt and the plaintiffs to the defendants, although the plaintiffs a reasonable time before the commencement of this suit tendered and offered to pay such amount, &c.—[Stating special damage.]

Plea:—That the plaintiffs did not become, nor were, entitled to the said shares, or any of them, nor the owners thereof, or any of them, nor had the defendants notice as alleged.—Upon which, issue was joined.

At the trial, before *Pollock*, C. B., at the London Sittings after Trinity Term, 1853, the plaintiffs gave evidence that they were assignees of the estate and effects of G. Rouge-

mont, against whom a fiat in bankruptcy issued on the 29th of November, 1847; that the plaintiff Graham was appointed official assignee on the 30th of November, 1847, and the other plaintiff creditors' assignee, on the 9th of December, 1847; that the bankrupt, at the time of his bankruptcy, was the proprietor and owner of 157 shares in the capital stock of the company, and was also at that time possessed of certificates of the said shares duly issued by the company under their seal; that the name of the bankrupt was, at the time of his bankruptcy, registered in the books of the company in respect of the said shares, and as the proprietor and owner thereof; that, before the bankruptcy, the bankrupt had paid upwards of 2000*l.* to the company for calls in respect thereof; that, up to the time of the bankruptcy, all calls had been duly paid, and that up to that time the calls made amounted to 25*l.* per share; that the shares were shares of 100*l.* each in the capital stock of the company, and that 75*l.* per share remained uncalled and unpaid, and that the holder of each share remained liable, so long as he continued to be so, to have calls made on him in respect of each such share to the amount of 75*l.*, and to the payment thereof, and that the holder and owner of such shares so continued liable during all the time from the bankruptcy of G. Rougemont to the date of the affidavit hereinafter mentioned.—[The bill of exceptions then set out a certificate under the seal of the company, and countersigned by the clerk, by which it was certified that G. Rougemont was entitled to twenty shares in the capital stock of the company. At the foot of it was this memorandum:—"N. B.—The certificate is not transferable, and must be returned to the office on any of the shares being disposed of."]

The plaintiff further proved, that, at the time of the bankruptcy, the bankrupt delivered up the said certificates to the official assignee; that, at the time of issuing the fiat, the company was in a bad plight; and that the bankrupt

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obtained his certificate on the 23rd of March, 1848; that, on the 14th of June, 1849, the clerk of the company sent to the plaintiff, G. Graham, a letter and notice in the following form:—

“ To G. Graham, Esq., Official Assignee of the Estate of
 G. Rougemont, Esq.

“ Van Diemen's Land Company's Office,
 6, Great Winchester Street, London ;
 14th June, 1849.

“ Sir,—Annexed is a copy of a notice, in virtue of which you are required to make a payment of one pound on each share standing in your name in the books of this company; and you are requested to present this letter at the office on making such payment.

“ I am, Sir, yours, &c.,
 GEO. H. HOWELL, Secretary.”

“ Van Diemen's Land Company's Office;
 7th June, 1849.

“ The Court of Directors of the Van Diemen's Land Company hereby give notice, that a call of one pound per share is made on the proprietors of stock in this company, which is to be paid at the company's office on or before Wednesday, the 18th day of July next.

“ GEO. H. HOWELL, Secretary.”

“ Van Diemen's Land Company, Established by Act
 6 Geo. 4, c. 39, and Incorporated by Royal Charter.

“ Amount of payment of call of 1*l.* per share, payable on
 or before the 18th of July, 1849.

“ 157 shares at 1*l.* each, is 157*l.*”

which said letter and notice was received by the said G. Graham: the shares never were transferred into the names of the plaintiffs or either of them.

The plaintiffs also gave evidence, that they did, before the commencement of this suit, on the 15th of February, 1853, cause to be made and sworn by two credible persons, before one of her Majesty's justices of the peace in Great Britain, an affidavit according to the tenor following:—

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[The bill of exceptions set out the affidavit, which stated the issuing of the fiat against G. Rougemont, the appointment of the plaintiffs as assignees; that, at the time of his bankruptcy, G. Rougemont was the proprietor of 157 shares in the company; and that the shares were legally vested in the plaintiffs as such assignees.]

And such affidavit was delivered, before the commencement of this suit, to the clerk for the time being of the company, to the intent that he might register the names of the plaintiffs as such assignees, as such proprietors of the said shares in the registry book or list of subscribers and proprietors of the said company; and the plaintiffs then offered and tendered to pay to the defendants whatever was due for calls in respect of the said shares. The plaintiffs received in answer a letter to the following tenor from the clerk of the company:—

“ Van Diemen's Land Company's Office,
 “ 6, Great Winchester Street;
 “ 17th February, 1853.

“ Gentlemen,—I acknowledge to have received from you an affidavit and notice requiring me to enter and register your names in the register book of proprietors of stock in this company, as the owners of 157 shares in the capital stock of the company, as assignees of Mr. George Rougemont. I beg to inform you that there are not any shares standing in the register book in the name of Mr. Rougemont.

“ I remain, Gentlemen, Yours &c.,

“ H. CATLEY, Secretary,

“ Clerk of the Company.”

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The plaintiffs also called as a witness a sharebroker, who deposed that, from the time of the said G. Rougemont becoming bankrupt up to December, 1852, the shares in the capital stock of the said company were nearly at a nominal price; that there was no quotation for them until that month; that, in that month they rose to the price of 19*l.* a share, which was the price at that time, assuming that all calls made up to that time, and which amounted to 28*l.* 10*s.* per share, had been paid.

Whereupon the defendants' counsel contended, that there was not any evidence for the consideration of the jury. The plaintiffs' counsel insisted, that there was evidence. The Lord Chief Baron directed the jury, that there was no evidence which would authorise them to find a verdict for the plaintiffs. The plaintiffs' counsel tendered a bill of exceptions to the above ruling,* and the case was argued (February 5(a)) by

Hoggins (J. H. Hodgson with him) for the plaintiffs.—The plaintiffs, as assignees of Rougemont, are entitled to the shares in question. [He referred to the 12th and 14th sections of the 6 Geo. 4, c. 39.] There is no doubt, that, by virtue of the Bankrupt Act then in force, 1 & 2 Will. 4, c. 56, s. 25, and the delivery of the certificates by the bankrupt to the official assignee, the shares at that time legally vested in him. The question then is, whether the conduct of the plaintiffs since that time amounts to a repudiation. It will be argued, that for the space of five years they had done nothing to denote their acceptance of the shares. But, there was no obligation on the plaintiffs to take any step. *Gibson v. Carruthers* (b) is an authority that it is not necessary for assignees to give express notice that they adopt a contract

(a) Before Coleridge, J., Maule, J., Crowder, J.
 J., Wightman, J., Cresswell, J., (b) 8 M. & W. 329.
 Erle, J., Williams, J., Crompton,

made by the bankrupt—the assignees take, unless they repudiate the contract, and it lies on the company to shew that they have repudiated. Here the plaintiffs had a right to hold the certificates until something was disclosed by the directors, to shew whether the shares were valuable or not. It was no doubt competent for the directors to declare the shares forfeited for nonpayment of calls; but they were bound to give the plaintiffs thirty days notice; and that they have not done. There is nothing on the face of the declaration to shew, that the plaintiffs have repudiated the shares; and, if their conduct was such as to amount to a repudiation, that should have been pleaded by the defendants. [*Wightman, J.*—In the letter of the 14th of June, 1849, the directors state that the shares are standing in the name of the official assignee.] At that time, he was clearly entitled to them, and nothing has since been done by the defendants to denude the plaintiffs of their right. The case of *Lawrence v. Knowles (a)*, which is relied upon by the defendants, is in reality in the plaintiffs' favour, for it shews that it is a question for the jury, whether the conduct of the assignees amounted to an abandonment of the shares. Here there was evidence from which the jury might have found for the plaintiffs.

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Bramwell for the defendants.—The shares did not vest in the plaintiffs by the mere act of bankruptcy. Wherever a right is accompanied with an obligation, the property does not vest in the assignees, unless they do some act to signify an acceptance of it; and that act must be done within a reasonable time. Under the 1 & 2 Will. 4, c. 56, s. 25, nothing more passes to the assignees than before that statute was conveyed by the deed of assignment. *Copeland v. Stephens (b)* decided, that the general assignment of a bankrupt's personal estate under his commission does not vest a term of years in the assignees, unless they do some

(a) 5 Bing. N. C. 399.

(b) 1 B. & Ald. 593.

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act to manifest their assent to the assignment, as it regards the term, and their acceptance of the estate. Where the assignees advertised a lease for sale by auction (without stating themselves to be the owners or possessed thereof), and never took possession of the premises; that was held to be a mere experiment to ascertain whether the lease was beneficial, and not to amount to an assent on their part to take the term: *Turner v. Richardson* (a). Also under the Insolvent Act, 53 Geo. 3, c. 102, s. 18, it has been held, that the general assignment of an insolvent's estate does not vest in his assignees a term of years, unless they do some unequivocal act to manifest their acceptance of it; and that a mere attempt to make it available to the estate, is not such an exercise of ownership as to create an implication of assent: *Lindsay v. Limbert* (b). *Wheeler v. Bramah* (c) is an authority to the same effect. The judgment of Lord Ellenborough in *Copeland v. Stephens* (d) shews that the doctrine is not limited to an interest in real property. The case of the *South Staffordshire Railway Company v. Burnside* (e), assumes that some affirmative act is necessary, in order to vest the property in the assignees. Here the assignees have done nothing for five years. It was their duty to realise the shares at the market price, and not to wait for the chance of their being more valuable: *Ex parte Badcock* (f). The defendants are not bound to shew affirmatively that the plaintiffs repudiated the shares, but the onus of proof is on the plaintiffs to shew that they accepted them. The plaintiffs should have done some act to indicate an acceptance, and that within a reasonable time. In *Lawrance v. Knowles* (g), *Bosanquet, J.*, says, "Here the bankrupt entered into extensive engagements, which he was incapable of fulfilling; his assignees might elect to

(a) 7 East, 335.

(b) 12 Moore, 209.

(c) 3 Camp. 340.

(d) 1 B. & Ald. 593.

(e) 5 Exch. 129.

(f) 1 Mon. & Mac. 231.

(g) 5 Bing. N. C. 399.

adopt them, but their election ought to be declared within a reasonable time." So, in *Hanson v. Stevenson* (a), Lord Ellenborough, C. J., says, "the assignees must make their election promptly." [*Wightman*, J.—Is not "reasonable time" a question of fact for the jury?] In one sense it is not. The Judge must direct the jury as to what would be a reasonable time under the particular circumstances of each case. Suppose the assignees had admitted that they might have made the affidavit of title within two months after the bankruptcy, would not the Judge be justified in telling the jury, that the lapse of five years was an unreasonable time? [*Cresswell*, J.—It may be an ingredient in considering that question, to see whether the situation of either party has been altered in the meantime.] In Com. Dig. "Temps" (D.), it is said, "What shall be a reasonable time, the justices are to determine." [*Maule*, J.—In the case of notice of dishonour of a bill of exchange, what is a reasonable time, is a question of law depending on the facts of each particular case.] Also in Co. Litt. 56. b., it is said, that "reasonable time shall be adjudged by the discretion of the justices before whom the cause dependeth." [*Crompton*, J.—Suppose the declaration alleged that the plaintiff elected to take the shares within five years after the bankruptcy, and that that was a reasonable time, could the defendant demur, on the ground that five years was an unreasonable time?] *Scheibel v. Fairbairn* (b), *Palmer v. Mozon* (c), and *Facey v. Hurdorn* (d), are authorities to shew that what is a reasonable time is a question of law, the facts having been ascertained by the jury.—He also referred to *Ex parte Vallance* (e).

Hoggins replied.

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(a) 1 B. & Ald. 303.

(b) 1 Bos. & P. 388.

(c) 2 M. & Sel. 43.

(d) 3 B. & C. 213.

(e) 2 Deacon, 354.

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COLERIDGE, J.—We are all of opinion, that there ought to be a *venire de novo*. It is not necessary, with the view the Court take of the case, to consider whether Mr. *Bramwell* is right in his argument, that it was necessary for the assignees to do some act shewing either an acceptance or a repudiation of the shares; because, assuming that to be so, and assuming that such act must be done within a reasonable time, we are of opinion, that reasonable time, in the absence of any rule of law applicable to this particular subject, is a question for the jury, if there are any facts for their consideration. Now, it cannot be said that there were no facts to be submitted to the jury, for it was proved that there were shares, upon which a certain amount had been paid; that these were in the possession of the bankrupt that he handed the certificates to his assignees; and though undoubtedly a considerable period of time elapsed before anything was done, on the other hand, it is open to observation, that when the assignees were called upon to do something, there was a temporary want of value in the shares, and an admitted fluctuation; and it might be right and proper for the assignees to wait, and see what turn affairs might take. It is also a matter for observation, that if the bankrupt and his assignees did nothing in the interval, the company also did nothing. It is enough to say, that there are circumstances on which it is right that the jury should pronounce an opinion; and, as the Lord Chief Baron declined to submit them to the jury, the case must go down again for trial.

On the following day, the Court intimated, that they would consider what was the proper question to be submitted to the jury.

Cur. adv. vult.

MAULE, J., now said.—It seems to us, that it would be proper to tell the jury, that there is no limit of time, until some one makes an application. It appears that a considerable time had elapsed, during which neither the bankrupt nor his assignees had called upon the company to do anything respecting the shares, nor had the company taken any step during the interval. We think that, in cases of this kind, a reasonable time will not begin to run until some one interested in the matter takes some step in respect of it.

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Venire de novo.

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THIS was a proceeding in error on a judgment of this Court (a) on a special case stated by consent, and in which the Court below gave judgment in favour of the plaintiff for the amount of certain trade fixtures.

By indenture, C. demised to E. an unfinished messuage for the term of ninety-seven years. The indenture contained a covenant by E., that, at

Channell, Serjt. (*Maude* with him) argued for the plaintiff

the expiration of the term, he would deliver up the demised premises unto C., "together with all locks, keys, bars, bolts, marble and other chimney-pieces, footpaces, slabs, and other fixtures and articles in the nature of fixtures, which shall, at any time during the said term, be fixed or fastened to the said demised premises, or be thereto belonging." E. took possession of and completed the messuage, and fitted it up with things necessary for carrying on the business of a tavern-keeper and licensed victualler; and for that purpose put in the premises certain fixtures of the description called and known as trade and tenant's fixtures. B. afterwards contracted with E. to purchase from him an underlease of the premises and the goodwill, and also the furniture, fixtures, stock in trade, &c., at a valuation. In pursuance of this contract, E. executed to B. an underlease, which contained a covenant on the part of the defendant in the same words as the above covenant by E. in his lease:—*Held*, on error, that the covenant above set forth did not restrain B. the lessee from disposing either of the tenant's or of the trade fixtures.

(a) Ante, Vol. 10, p. 496.

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in error, the defendant below (May 9) (a).—The question turns upon the construction of the covenant contained in both leases. The plaintiff in error submits that, by the terms of that covenant, the lessee is restrained from disposing either of the tenant's or of the trade fixtures on the demised premises at the expiration of the lease. The plaintiff contends that the lessee has no right to remove any fixtures, upon two grounds:—first, that the words “other fixtures and articles in the nature of fixtures,” are sufficient to comprehend all fixtures of what nature soever; and secondly, assuming that argument to be incorrect and that the words are to have a limited construction, that the articles enumerated refer to other than landlord's fixtures, and consequently tenant's and trade fixtures are included under those terms.

First, it will be contended by the other side, that the general words are restricted by the particular words which precede them, and that they come within the rule by which they ought to be construed as applicable to persons and things ejusdem generis. The following cases, which were cited in support of the application of this rule in the Court below, are not in point: *Kitchen v. Shaw* (b), *Sandiman v. Breach* (c), and *Rex v. The Manchester and Salford Waterworks Company* (d); for those decisions turned upon the construction of particular statutes, and the rule applicable to statutes cannot be extended to the construction of covenants, which, in case of ambiguity of language, are to be taken most strongly against the covenantor.

Secondly, assuming that the latter words in this covenant are to have a limited construction, it was clearly intended by the parties that the covenant should restrict the lessee

(a) Before Coleridge, J., Maule, J., Wightman, J., Erle, J., Williams, J., and Crowder, J.; but Williams, J., did not hear the whole of the argument, and de-

clined to give any opinion.

(b) 6 Ad. & E. 729.

(c) 7 B. & C. 96.

(d) 1 B. & C. 630.

from removing anything in the nature of a fixture attached to the premises. According to the old law, a chattel, when annexed to the freehold, became part and parcel of the freehold itself, and could not be removed by the tenant; but in the course of time an exception arose in favour of what are called tenant's and trade fixtures, which the tenant was held to have the right to disannex. These descriptions of fixtures are better known than what are denominated landlord's fixtures, which are difficult to define. Tenant's fixtures are those chattels which are annexed to the freehold for the personal convenience of the tenant; and trade fixtures are such as are annexed for the more profitable use of the premises. Such chattels as are annexed for the better enjoyment of the article itself,—as, for example, a machine screwed to the floor—cannot be strictly considered as fixtures. In *Hellawell v. Eastwood* (a) a spinning mule screwed to the floor was held distrainable for rent. Now this is in effect a building lease; and it was intended that at the expiration of the term the tenant should give up to the landlord the land and the premises erected upon it, with all the fixtures attached thereto. Some of the articles enumerated in the covenants are not fixtures, as "locks, keys, bolts, and bars," but are parcel of the building; and marble chimney-pieces are clearly tenant's fixtures and removable by him: *Ex parte Quincy* (b), *Lawton v. Lawton* (c), *Lawton v. Salmon* (d). [*Erle, J.*—Is that proposition universally true? I used to be of opinion that it only applied to *ornamental* chimney-pieces. *Crowder, J.*—*Elwes v. Maw* (e) shews that the tenant may remove matters of ornament.] It appears from the lease that the premises were to be used for the purpose of carrying on the business of a public-house, and therefore that such fixtures were in the contemplation

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(a) 6 Exch. 295.

(b) 1 Atk. 477.

(c) 3 Id. 13.

(d) 1 H. Blac. 258.

(e) 3 East, 38.

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of the parties to the covenant. [*Maule, J.*—The tenant would not be bound to carry on the business during the whole term of ninety-seven years, which is one of very long duration.] The following cases cited on the argument in the Court below appear to have no real bearing upon the question: *Naylor v. Collinge* (a), *Martyr v. Bradley* (b), *West v. Blakeway* (c).

Bovill contra.—The defendant in error is entitled to judgment in respect both of the tenant's and trade fixtures. This covenant was introduced into the lease *ex abundanti cautela*, not to enlarge the landlord's title to the fixtures which he has by law, but to afford him a better remedy, and to insure the interests of a third party who might otherwise have been without remedy. The term "fixtures" is ambiguous, for it may mean landlord's, tenant's, or trade fixtures; and therefore, for the purpose of ascertaining the real meaning of the term, the whole covenant must be taken into consideration. In *Broom's Maxims*, p. 450, it is said that "it is a rule laid down by Lord Bacon, that *copulatio verborum indicat acceptationem in eodem sensu* (d)—the coupling of words together shews that they are to be understood in the same sense. And where the meaning of any particular word is doubtful or obscure, or where the particular expression when taken singly is inoperative, the intention of the party who has made use of it may frequently be ascertained and carried into effect by looking at the adjoining words, or at expressions occurring in other parts of the same instrument, for *quæ non valeant singula juncta juvant*—words which are ineffective when taken singly operate when taken conjointly: one provision of a deed or other instrument must be construed by the bearing

(a) 1 Taunt. 19.

(b) 8 Bing. 24.

(c) 2 M. & Gr. 729.

(d) *Bac. Works*, vol. 4, p. 26.

it will have upon another." And the learned writer subsequently adds, "The maxim" of *noscitur a sociis* "is more-over applicable, like other rules of grammar, whenever a construction has to be put upon a will, statute, or agreement." The application of this rule on a similar question is illustrated by the case of *Reed v. Ingham* (a). Now the articles here enumerated are landlord's fixtures, and such words, operating as a limitation upon the general words connected with them in the same clause—"other fixtures," must be taken to mean "other fixtures of a like nature." [Maule, J.—The parties to the lease knew at the time that the house was to be used as a public-house, and the fittings of such a place are expensive. It therefore seems singular, that, if it was intended that the trade fixtures should go to the landlord, no such fixtures were specified in the covenant.] The same argument is applicable to the tenant's fixtures, as observed by *Platt, B.*, in his judgment,—for "marble chimney-pieces" are clearly landlord's fixtures. It was so held in *Poole's case* (b), *Amos on Fixtures*, 2nd edit. p. 186. Matters of ornament are removable by the tenant: *Leach v. Thomas* (c), *Buckland v. Butterfield* (d). The chimney-pieces here mentioned mean such as are necessary to make the house complete, and as the words stand with others which are clearly landlord's fixtures, the natural inference is that fixtures of a similar character were intended. In the Court below it was assumed that such chimney-pieces were removable by the tenant.

Channell, Serjt., in reply, contended that there was no real distinction between marble, and ornamental marble, chimney-pieces; but that, if there was, the presumption was in favour of the better sort being intended.

Cur. adv. vult.

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(a) 3 E. & B. 889-
(b) 1 Salk. 368.

(c) 7 Car. & P. 327.
(d) 2 B. & B. 54.

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COLERIDGE, J., now delivered the judgment of the Court. —The question in this case turns upon the construction of a covenant in a lease by Lord Camden and the Rev. Thomas Randolph to the defendant in error, Elliott, which has been introduced into an underlease from Elliott to Bishop, the plaintiff in error; and, according as that may be construed, the former will be entitled to recover from the latter the sum of 573*l.* 16*s.*, or 501*l.*, or 72*l.* 16*s.*, or nothing. The first of these sums represents the agreed value of certain trade and tenant's fixtures which Elliott has professed to convey to Bishop; the second and third the agreed values of the trade and tenant's fixtures respectively. Whether Elliott can convey a good title to both or either, or whether he is restrained, as to both or either, by the covenant before referred to, is the question to be decided.

By the covenant in the original lease, Elliott was bound peaceably to surrender and deliver up to Lord Camden at the end of the term, which was for 97½ years, the demised premises, "together with all locks, keys, bars, holts, marble and other chimney-pieces, foot-paces, slabs, and other fixtures, and articles in the nature of fixtures, which should at any time during the term be fixed or fastened to the said demised premises;" and, by the same covenant in the underlease, Bishop is bound to surrender and deliver up the same articles to Elliott at the expiration of his underlease; and the question is, whether the trade and tenant's fixtures above mentioned, or either of them, are included within these words.

It was not denied, on the one hand, in the argument, that both trade and tenant's fixtures were comprised within the general words of the covenant in their ordinary and unrestrained sense; nor was it seriously disputed, on the other, but that those words might properly receive a more limited construction, by reference to the specific articles previously enumerated, so as to include nothing that was

not of the same class within which they fell. The plaintiff in error, however, contended, that among these particulars were found some tenant's fixtures. The defendant insisted that they were all such as are commonly called landlord's fixtures, which by the general law are not removable by the tenant. And, upon consideration, we are of that opinion.

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With respect to locks and keys, bolts, and bars, there can be no question, whether properly called fixtures or not, that the tenant cannot remove them; they are as much part of the house, and to go with it, as the doors or windows to which they may be attached or belong; nor will there be any question as to the foot-paces or slabs, if upon examination it shall appear that the marble and other chimney-pieces to which they are appendages are also of the same class.

Now, there are certainly not wanting some authorities to shew that chimney-pieces, whether marble or not, may be removed during the term by the tenant. In *Ex parte Quincey* (a), Lord Hardwicke says,—“During the term a tenant may take away chimney-pieces, and even wainscot; which is a very strong case.” And again, in *Lawton v. Lawton* (b), he says: “What would have been held to be waste in Henry the Seventh's time, as removing wainscot fixed only by screws, and marble chimney-pieces, is now allowed to be done.” Lord Holt, some years before, in *Poole's case* (c), had denied that hearths and chimney-pieces put up by a tenant to complete his house, were removable by him. In *Lawton v. Salmon* (d), Lord Mansfield includes, among things which may be removed, “marble chimney-pieces and the like, when put up by the tenant,”—adding what is significant, “This is no injury to the landlord; for the tenant leaves the premises in the

(a) 1 Atk. 477.

(b) 3 Atk. 13.

(c) 1 Salk. 368.

(d) 1 H. Blac. 260.

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same state in which he found them, and the tenant is benefited."

Down to this authority, we do not find the condition of ornament expressly introduced; but, in *Elwes v. Maw* (a), Lord *Ellenborough*, tracing the gradual change of the law in this matter, says that "the indulgence in favour of the tenant for years during the term has been carried further since Lord *Holt's* time, and he has been allowed to carry away *matters of ornament*, as, ornamental marble chimney-pieces, pier-glasses, hangings, wainscot fixed only by screws, and the like." Later again, in *Buckland v. Butterfield* (b), *Dallas*, C. J., delivering the judgment of the Court of Common Pleas, makes the right to remove fixtures of this sort depend essentially upon their being of an ornamental nature. He states the general rule of law, and says, "In the progress of time this rule has been relaxed, and many exceptions have been grafted on it: one has been in favour of matters of ornament, as, ornamental chimney-pieces, pier glasses, hangings, wainscot fixed by screws only, and the like." In *Leach v. Thomas* (c), my Brother *Patteson*, at Nisi Prius, acted on this, and told the jury that, if they thought that the chimney-piece there in question was an ornamental chimney-piece, the defendant, a tenant from year to year, who had erected it during his tenancy, had a right to remove it.

It does not appear to us at all difficult to reconcile the difference which may appear in these authorities, nor to extract the principle which is to be gathered from them. Considering that the law has been regularly and gradually relaxing its rule as to the removability by tenants of fixtures erected by them, the difference between Lord *Holt* and Lord *Hardwicke* is explained by the difference of time. Lord *Holt* was speaking of the rule unrelaxed; and when Lord *Hardwicke* spoke of chimney-pieces being removable

(a) 3 East, 53.

(b) 2 B. & B. 54.

(c) 7 Car. & P. 327.

generally, without any qualification as to their material or ornamentation, it cannot be supposed that he intended to lay down the rule more broadly than he did in a later case where he spoke in more qualified terms of marble chimney-pieces, or than Lord *Mansfield* when he used the same qualified terms still later. Nor, on the other hand, would it be reasonable to suppose that the latter intended to limit it to marble chimney-pieces, merely as such, without reference to the expense and artistic skill employed upon them. Both, no doubt, had in their minds the same principle which the later cases expressly bring forward, that of their being ornamental. In all these cases, no doubt, the same principle was intended to be laid down which is more formally and precisely stated by *Dallas, C. J.* It is a matter of common knowledge, that a century ago marble chimney-pieces of ordinary grain and plain workmanship were by no means so commonly used in middle-rate houses as now; while chimney-pieces of foreign marbles and workmanship, highly sculptured and of much expense, were objects much esteemed and often erected in houses of a higher description. Where these had been substituted by the tenant for a chimney-piece of wood or stone, it was but a reasonable relaxation of the strict rule of law to allow their removal during the term. Of chimney-pieces such as these it seems to us that Lord *Hardwicke* and Lord *Mansfield* intended to speak. And, when Lord *Ellenborough* goes more into detail, by his classing them under "matters of ornament," and with "pier-glasses, hangings, and wainscot fixed only by screws, and the like," he marks distinctly both the principle and the limit of the relaxation. Indeed, it would be very unreasonable to hold that a chimney-piece of the plainest workmanship and most moderate expense, however affixed, might be removed merely because it was of polished lime-stone, and therefore denominated marble, but that one of granite or free-stone, however wrought, and at whatever expense, or of wood, however skilfully carved, might not.

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Applying these remarks to the "marble and other chimney-pieces," in this covenant, placed as they are between "locks, keys, bolts, bars," and "foot-paces and slabs,"—the covenant, too, having reference to a building used and intended to be used as a public-house,—we think it clear that they do not refer to such chimney-pieces as are removable by the tenant, but, like the rest of the particulars with which they are classed, to such only as are commonly called landlord's fixtures. The argument, therefore, of the defendant in error applies: and we ought to limit the general words which follow to fixtures of the same kind, that is, to fixtures other than trade or tenant's fixtures. This conclusion makes it unnecessary to distinguish between the two.

It may be, that, by so construing the covenant, we reduce its operation to that merely which the general rule of law would have given the landlord without it. But this is an argument of little weight. No modern lease probably will be found which does not contain covenants merely to secure rights subsisting at common law, but perhaps more easily enforced by the help of an express contract. These particular words may have been introduced for greater caution, because of the language of some of the decisions quoted, or to bring an infringement of the right within the clause of re-entry.

We are of opinion, upon the whole, that the judgment of the Court below should have been for the whole sum claimed, and should be amended accordingly, by entering it for the defendant in error for 573*l.* 16*s.*

Judgment accordingly.

Exchequer Reports.

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RUSSELL *v.* CROYSBILL.

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May 30.

THE declaration stated, that the plaintiff sues the defendant "as, and being, the official manager of The London and Birmingham Extension and Northampton, &c. Railway Company, &c. for money payable by the said company to the plaintiff for work done, and materials for the same provided by the plaintiff for the said company before the making of an order for the dissolution and winding up of the affairs of the said company, afterwards and before this suit made, according to the provisions of the said statute."

Plea.—That the said company always was a joint stock company, within the meaning of the Act of Parliament passed in the year 1844, for the registration, incorporation, and regulation of joint stock companies, and not a banking company, school, scientific or literary institution, friendly society, loan society, or benefit building society, and was a company to which the said Act applied and applies, and was a partnership consisting of more than twenty-five members, and the formation of which was commenced after the 1st day of November, A.D. 1844, and was established in England for a purpose of profit: that the said company was

The 50th section of the Winding-up Act, 11 & 12 Vict. c. 45, which requires actions to be brought against the official manager of the company, does not apply to a joint-stock company provisionally registered.

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provisionally registered by the promoters thereof, and such provisional registration duly certified by the registrar of joint stock companies, as required by and in pursuance of the said Act of Parliament; but the said company was never completely registered under the said Act of Parliament, nor was the said company ever incorporated by statute, charter, or otherwise, or authorised by statute or letters patent or otherwise, to sue or be sued in the name of any officer or person on behalf of the same; nor was there ever any power or authority for the said company to sue or be sued otherwise than in and by the names of the individual members thereof: that the debts claimed by the plaintiff in his declaration were contracted by the members of the said company or partnership, for the purposes thereof, after the provisional registration thereof, as aforesaid, and before the said company was ordered to be dissolved and wound up under "The Joint Stock Companies Winding-up Act, 1848," and "The Joint Stock Companies Winding-up Amendment Act, 1849," and were and are due and owing by and from the members of the said company in their individual capacity, but were not, nor are, due by or from the said company or the members thereof, in any corporate or other capacity or otherwise howsoever: that the defendant was appointed and is official manager of the said company, under and by virtue of the two last-named Acts of Parliament, after the said company was ordered to be dissolved and wound up under and in pursuance of the said Acts, and not otherwise howsoever.

Demurrer and joinder therein.

Willes argued in support of the demurrer (May 30).—The question is, whether the Winding-up Acts (11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108) authorise actions to be brought against the official manager of a joint stock company provisionally registered under the 7 & 8 Vict. c. 110. It is submitted that they do. The 50th section of the 11

& 12 Vict. c. 45(a), enacts, that, after the appointment of an official manager, all actions to be commenced by any persons against such company, or any person authorised to be sued as the nominal defendant on behalf of the same, shall be commenced and prosecuted against the official manager. By the 12 & 13 Vict. c. 108, s. 1 (b), the provisions

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(a) Sect. 50. "That, after the appointment of any official manager under this Act, all actions, suits, and other proceedings at law or in equity, which might have been commenced, instituted, or prosecuted by or on behalf of the company with respect to which such appointment shall be made, against any persons, whether contributories of the company or not, shall be commenced or instituted and prosecuted by the official manager, by the style and designation of "The Official Manager" of such company (describing it under the style or firm by which it is described in the order absolute), as the nominal plaintiff or petitioner for and on behalf of such company, and that whether there be one or more official manager or managers; and that all debts which might have been proved by or on behalf of the company against the estate of any bankrupt or insolvent debtor to the company, shall and may be proved against such estate by the official manager of such company by the style and designation aforesaid; and that all actions, suits, and proceedings at law or in equity, to be commenced or instituted by any persons, whether contributories of such com-

pany or otherwise, against such company, or any person duly authorised to be sued as the nominal defendant on behalf of the same, shall and lawfully may be commenced, instituted, and prosecuted against the official manager of such company (by such style and designation as aforesaid), as the nominal defendant for and on behalf of such company, and that whether there be one or more such official manager or managers."

(b) Sect. 1. "Whereas it is expedient to amend as after mentioned the Joint Stock Companies Winding-up Act, 1848: Be it enacted, &c., That, notwithstanding anything in the said Act contained, importing a more limited application thereof, the same shall apply to all partnerships, associations, and companies whereof the partners or associates are not less than seven in number, whether incorporated or unincorporated, and whether formed or subsisting before or after the passing of the said Act or this Act, other than and except railway companies incorporated by Act of Parliament, to which companies such Act shall not apply: Provided always, that, upon the hearing of any petition for the dissolution

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of the former Act are made applicable to all partnerships, associations, and companies consisting of not less than seven members, with the exception of railway companies. An ordinary club has been held to be an "association" within the meaning of those Acts: *In re The St. James's Club*(a). It will be argued, that the 11 & 12 Vict. c. 45, s. 50, only applies to cases in which the company might have been sued in its corporate name, or in the name of a public officer, and where the judgment might be enforced, not only against the company, but the shareholders. But the section admits of no such construction. It is conceded, that if, in this case, judgment was obtained against the official manager, it could not be enforced against the company or shareholders, under the 66th section of the 7 & 8 Vict. c. 110, since that only applies to companies completely registered. There is no reason, however, why a creditor should not proceed to judgment for the purpose of establishing a claim, which would afterwards be dealt with by the Master in Chancery. The cases of *Pritchard v. The Manager of the London and Birmingham Extension, &c. Railway Company*(b), and *Beardshaw v. Lord Londesborough*(c), will be relied on as opposed to this view. But the former only decided that a judgment against the official manager could not be enforced against a shareholder under the 66th section of the 7 & 8 Vict. c. 110; and in the latter it was held, that an action against a contributory in respect of a demand for which the company might be liable, was not necessarily an action against the company. It is admitted

of any such partnership, association, or company, the Court shall, in considering the necessity or expediency of any such dissolution, or the terms or special directions subject to which it may think fit to allow such dissolution, have regard to any

articles of partnership or other contract which shall be subsisting between the members of such partnership, association, or company," &c.

(a) 20 L. J., Chanc., 639.

(b) 15 C. B. 331.

(c) 11 C. B. 498.

on the face of this plea, that all the members of the company were liable for this debt. In *Ex parte Barber* (a), it was decided by Lord *Cottenham*, that a railway company provisionally registered, and which had become abortive, was within the provisions of the 11 & 12 Vict. c. 45.—He also cited *Wormwell v. Hailstone* (b).

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J. Brown, contra.—This is not a case within the 11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108. *Beardshaw v. Lord Londesborough* (c), and *Pritchard v. The Official Manager of the London and Birmingham Extension, &c. Railway Company* (d), are express authorities that the 50th section of the 11 & 12 Vict. c. 45, only applies to actions against the company by name, or in the name of their public officer. The statute contemplates two kinds of actions: first, actions against the company as such; secondly, actions against the individual members. In the former case, the 50th section requires the action to be brought against the official manager, and then, by the 57th section (e), the judgment may be enforced against the company and contributories in the same manner as if it had been entered up against the company or their public officer. But where the action is brought against the individual members of the company, the 62nd (f)

(a) 1 Mac. & G. 176.

(b) 6 Bing. 668.

(c) 11 C. B. 498.

(d) 15 C. B. 331.

(e) Sect. 57. "That all judgments which shall be entered up in any action at law against the official manager of any such company, shall have the like effect and operation upon and against the property of such company, and upon and against the persons and property of the contributories thereof, and shall be enforced in like manner as if such judgments had been enter-

ed up against such company, or against any person duly authorised to be sued on behalf of the same."

(f) Sect. 62. "That it shall be lawful for the official manager, with the leave of the Master, to be signified by writing under his hand, to defend, either by his official style and designation or in the name of the original defendant, any action or suit brought against any individual contributory of the company; but that in such case any judgment or decree to be obtained by the plaintiff, shall

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section enables the official manager, with the leave of the Master, to come in and defend; but in that case the judgment has only the same effect as if it had been obtained against the original defendant. In *Pritchard v. The Official Manager of the London and Birmingham Extension, &c. Railway Company*, judgment had been obtained against the official manager; but the Court held, that it could not be enforced against a shareholder, because the 50th section of the 11 & 12 Vict. c. 45, did not apply to a company provisionally registered.

Willes, in reply, argued, that a provisionally registered company was "a company" within the meaning of the 11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108.—He referred to the 7 & 8 Vict. c. 110, s. 23, 7 & 8 Vict. c. 111, s. 1, and 11 & 12 Vict. c. 45, s. 3.

Cur. adv. vult.

POLLOCK, C. B., now said.—On the argument of this case we were referred to *Pritchard v. The Official Manager of the London and Birmingham Extension, &c. Railway Company*, and there can be no doubt that it is directly in point. The Court of Common Pleas there considered that an action against the official manager could only be brought where an action could be maintained against the company as a company, or against some person authorised to be sued on their behalf, and that the 50th section of the 11 & 12 Vict. c. 45, did not apply where the individual members of the company were alone liable to be sued. We are bound by that decision, which can only be reviewed by a Court of error; and therefore our judgment will be for the defendant.

Judgment for the defendant.

have the same effect, but no further or otherwise, than if the same had been obtained against

the original defendant in such action or suit."

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BRUCE v. NICOLOPULO.

May 30.

THE declaration stated, that the plaintiff and the defendant agreed by charterparty, that the plaintiff's ship, called the "Gipsey," should with all convenient speed be made ready, and, after discharging her outward cargo for owner's benefit, should proceed to Galatz or Ibraila, as ordered at Constantinople or Soulinah by charterer's agent, and there receive and load a full and complete cargo of wheat or Indian corn, and, being so loaded, should therewith proceed to Cork, Falmouth, or Plymouth, at the master's option, for orders (which were to be given by the charterer within twenty-four hours after arrival or lay days to count) to discharge at a safe port in the United Kingdom of Great Britain and Ireland, or as near thereto as she might safely get, and deliver the same agreeable to bills of lading, and so end the voyage (restraints of princes and rulers, the dangers of the sea and navigation, fire, pirates, and enemies during the said voyage always mutually excepted); twenty-five days were to be allowed the defendant, if the ship were not sooner dispatched, for loading at the port of loading, and for discharging at port of discharge; said lay days to commence on the day the vessel should be ready to receive cargo, to cease when loaded, and recommence on the day the vessel arrived at the port of discharge. And the defendant did thereby promise and agree to load the said vessel with the said cargo at loading port, and also to receive the

The plaintiff and defendant agreed by charterparty that the plaintiff's ship should, after discharging her outward cargo, proceed to Galatz or Ibraila, as ordered at Constantinople by charterer's agents, and there receive a full cargo of wheat; and being so loaded, should therewith proceed to Cork for orders to discharge at a safe port in the United Kingdom, and deliver the same agreeable to bills of lading, and so end the voyage (restraints of princes and rulers, the dangers of the seas, &c., during the said voyage, always mutually excepted). The vessel, after discharging

her outward cargo, proceeded to Constantinople; and, in consequence of orders there given by the defendant's agent, the master took the vessel to Ibraila. Before her arrival there, a proclamation had been promulgated by the Russians, who had invaded Wallachia, prohibiting the exportation of wheat:—*Held*, first, that the exception of the restraint of princes and rulers, &c., applied whilst the vessel was at Ibraila; secondly, that a copy of a printed placard, with the name of the Russian commander attached to it, and posted on the walls of Ibraila, was admissible as evidence of the prohibition.

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same at her port of delivery, as therein stated; and, also, that he should and would pay freight as follows, that is to say, at and after the rate of 20s. per imperial quarter for wheat or Indian corn, &c. And it was thereby also agreed, that, in the event of hostilities preventing the ship reaching her destination in the ordinary course, the charter was to be null and void.—Averments: that the said vessel was ordered by the charterer's agents at Constantinople to proceed to Ibraila, to receive and load the said cargo; and the plaintiff did all things necessary on his part to entitle him to have the agreed cargo loaded on board the said ship at Ibraila, and that the time for doing so has elapsed.—Breach: that the defendant made default in loading the agreed cargo, although he was not prevented from loading the same by any such restraint of princes or rulers, dangers of the sea or navigation, fire, pirates, or enemies, as in the said charterparty mentioned; and the said ship was not prevented by hostilities from reaching her destination in the ordinary course.

Plea (inter alia)—That the defendant was prevented from loading the agreed cargo by the restraint and prohibition of the ruler of the country wherein Ibraila was and is situate; the said ruler having, before the said vessel was ready to receive the cargo, as in the declaration mentioned, prohibited wheat and Indian corn from being loaded at, and from being exported from, Ibraila, and having hindered and prevented the defendant from loading such cargo at Ibraila aforesaid.

The plaintiff joined issue on the plea, and also demurred to it.

At the trial, before *Cresswell*, J., at the last Liverpool Spring Assizes, it appeared, that, in September, 1853, the "Gipsey" left London for Shields, where she loaded a cargo of coal, with which she sailed for Trieste, and, having there discharged her cargo, proceeded to Constantinople, where she arrived on the 10th of February, 1854. In con-

sequence of orders there given by the defendant's agent, the master took the vessel to Ibraila, where she arrived on the 19th of March, 1854. On the same day the master informed the defendant, that he was ready to receive the cargo in pursuance of the charterparty, but the defendant refused to load the vessel, on the ground that the exportation of corn was prohibited; and on the 19th of April the vessel left without a cargo. On the part of the defendant, evidence was adduced to shew, that, before the vessel arrived at Ibraila, an edict had been promulgated by the Russians, who had invaded Wallachia, prohibiting the exportation of wheat or Indian corn. For the purpose of proving this edict a witness was called, who stated that, after the invasion, Prince Gortschakoff, who was the commandant of the Russian forces, exercised the supreme authority in Wallachia; that printed placards were posted on the walls in Ibraila, signed "Gortschakoff." The defendant's counsel then proposed to ask the witness, whether a paper produced was not a copy of the printed placards. This was objected to, and the objection allowed by the learned Judge.

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The plaintiff obtained a verdict; but leave was reserved to the defendant to move to enter a verdict for him on the above plea, the Court to say whether the evidence offered was admissible, and whether it proved the plea.

J. Wilde, in the following Term, obtained a rule nisi accordingly; and

Hugh Hill and *Burnie* now argued in support of the demurrer, and shewed cause against the rule.—First, according to the true construction of the charterparty, the exception of the "restraints of princes and rulers" does not apply to the vessel while in the port of loading. The words "during the said voyage," mean the voyage from the port of loading to the port of discharge, and do not include the port of loading. If the word "mutually" had been omitted,

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the clause would have enured for the benefit of the charterer only; that word has been inserted for the purpose of giving the benefit of the exception to the owner as well as the charterer. The charterparty does not mention the place where the vessel then was, but only provides that she shall proceed to Galatz or Ibraila, and, having there loaded a cargo, shall therewith proceed to Cork, &c.; so that the voyage first commences on her departure from the port of loading. It will perhaps be argued, that, if the vessel was prevented by enemies from reaching her port of loading, the owners would be protected by this exception in the charterparty. There might be some force in that argument, if this were the only exception; but there is this further provision for the benefit of the shipowner, viz. "that in the event of hostilities preventing the ship reaching her destination in the ordinary course, the charter was to be null and void." [*Martin, B.*—That provides for a different state of things. If this Government had prohibited all ships from going to Ibraila, that clause would have applied.] In *Crow v. Falk (a)*, the plaintiff and defendants agreed by charterparty, that a ship then at Liverpool, of which the plaintiff was master, should there load a full cargo, and, being so loaded, should proceed to Stettin, and deliver the same, and so end the voyage, (restraints of princes and rulers, &c., during the said voyage, always mutually excepted); and it was held that the exception only applied after the ship left Liverpool. Lord *Denman, C. J.*, there says, "The words of the charterparty are perfectly clear. The end of the voyage is expressly marked out; the beginning is not, but the voyage could not begin before the ship's loading was completed: the exception is confined to the time during the voyage." No doubt there is this difference between that case and the present, that there no voyage intervened prior to the time of loading at Liverpool; but in both cases the

words "during the said voyage," limit the exception to the voyage during which freight is to be earned. [Platt, B.—It is during the voyage predicated in the charterparty.]

Secondly, as to the admissibility of the evidence. It is not denied that secondary evidence of the placards on the walls would have been admissible, if a sufficient foundation had been laid for it. The first step was to prove that there was a binding proclamation by Prince Gortschakoff, prohibiting the exportation of grain. For that purpose, it should have been proved, that this was the mode in which Prince Gortschakoff promulgated his orders; and, that he directed the placards in question to be printed and posted on the walls. [Pollock, C. B.—Suppose London was in the military occupation of an enemy, and proclamations, signed by the person in command, were posted on the walls; what other evidence of the fact could be given?] The ordinary mode of proving the foreign law affords some analogy. [Pollock, C. B.—Prince Gortschakoff was in military occupation of the town; and, therefore, it is not likely that a proclamation with his name attached to it would be posted on the walls without his authority. Alderson, B.—There is, on the walls in a town in the military occupation of the Russians, a proclamation with the name of Prince Gortschakoff, the Russian military commander, printed at the end of it: surely that is evidence to go to the jury, that Prince Gortschakoff caused it to be printed and posted there.]—They referred to *Rex v. Hunt* (a).

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J. Wilde and *T. Jones* appeared for the defendant, but were not called upon to argue.

POLLOCK, C. B.—The rule must be absolute to enter a verdict for the defendant, and he is also entitled to judg-

(a) 3 B. & Ald. 566.

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ment on the demurrer. In my opinion the plea affords a complete answer to the action. I have read the case of *Crow v. Falk* (a), and cannot subscribe to it.

ALDERSON, B. and PLATT, B., concurred.

MARTIN, B.—Assuming the case of *Crow v. Falk* to be good law, this case is clearly distinguishable, because here the ship was to go to Constantinople, and from thence to Galatz or Ibraila, as ordered by the charterer's agents at Constantinople. Therefore, by the contract the ship was to be, in one sense, on her voyage from the time of leaving Constantinople. I therefore think that the plea is good. I also think that the evidence was admissible, and that it proved the plea.

Rule absolute (b); and judgment for the defendant on the demurrer.

(a) 8 Q. B. 467. (b) See *Mortimer v. M^cCallan*, 6 M. & W. 68, 72.

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CLEMONTSON v. BLESSIG and Another.

June 4, 6.

THE declaration stated, that one Louis Stiffel, on behalf of himself and certain other persons whose names are unknown to the plaintiff, but who, together with the said Louis Stiffel, carried on trade and business at Odessa in partnership, under the style or firm of Stiffel Brothers, had given to the plaintiff an order for about 300*l.* worth of goods, to be delivered by the plaintiff to a carrier to be forwarded for shipment; and thereupon, in consideration that the plaintiff, at the request of the defendants, would execute such order, and would pay to the defendants a sum of money amounting to one and a quarter per centum on the invoice amount of the price of such goods, and would permit the defendants to debit the said firm or partnership of Stiffel Brothers with the price of such goods, and to receive such price for the use of the defendants, and would deliver the carrier's receipt for

A declaration stated, that S., who carried on business at Odessa, had given the plaintiff an order for goods, to be delivered by the plaintiff to a carrier to be forwarded for shipment; and thereupon, in consideration that the plaintiff would execute such order, and would pay the defendants one and a quarter per cent. on the invoice price of the

goods, and would permit the defendants to debit S. with the price of the goods, and would deliver the carrier's receipt for the goods to the defendants, the defendants promised the plaintiff to accept his draft at four months date for the invoice amount of the goods, on the plaintiff's delivering to the defendants the carrier's receipt.—Averment of performance of conditions precedent.—Breach: non-acceptance by the defendants of the plaintiff's draft:—Plea: that S., at the time of the agreement, was an alien, resident at Odessa in the empire of Russia; and that, after the making of the agreement, and before any breach by the defendants, and before and at the time when the plaintiff was to have dispatched the goods in execution of the order, S. became, and still is, an enemy of the Queen; by reason whereof, the plaintiff could not lawfully dispatch the goods to S. in execution of the said order.—Replication: that, in the declaration of war against the Emperor of Russia, her Majesty waived her right of seizing enemies' property on board a neutral vessel; and by an Order in Council, it was ordered, that Russian merchant vessels, in any ports or places in her Majesty's dominions, should be allowed six weeks for loading their cargoes and departing; and that such Russian merchant vessels, if met at sea by any of her Majesty's ships, should be permitted to continue their voyage, if, upon examination of their papers, it should appear that their cargoes were taken on board before the expiration of the above period.—Averments, that the goods in the declaration mentioned were, long before the expiration of the said space of six weeks, delivered by the plaintiff to the carrier to be forwarded for shipment, and the same could have been shipped, pursuant to the Order in Council, within the said space of six weeks. On demurrer to the replication:—*Held*, that the plaintiff was entitled to judgment; for, assuming that the declaration of war would, of itself, have made it illegal for the plaintiff to send the goods to an enemy, they might have been lawfully shipped within the period mentioned in the Order in Council.

Semble: Per *Martin, B.*, that, even if there had been no Order in Council, the plaintiff might have lawfully shipped the goods.

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such goods to the defendants, the defendants promised the plaintiff that they would accept the plaintiff's draft at four months date for the invoice amount of such goods, against and on the plaintiff delivering to the defendants, and on the defendants receiving, the carrier's receipt for such goods; and the plaintiff, relying on the said promise of the defendants, executed such order as aforesaid; and, although the plaintiff hath performed all conditions precedent necessary to be done and performed, and was ready and willing to do all things which it was necessary for him to be ready to do, and all things have been done and happened before this suit to entitle the plaintiff to have the said draft accepted by the defendants, yet the defendants have not accepted the said draft, but so to do wholly neglect and refuse.

Plea—That the said Louis Stiffel and the said other persons for whom and on whose behalf the said order was given, as in the declaration mentioned, at the time of the agreement between the plaintiff and the defendants, in the declaration mentioned, and continually from thence hitherto, were and are aliens resident out of the dominions of her Majesty the now Queen, to wit, at Odessa, in the empire of Russia; and that after the making of the said agreement, and before any breach thereof by the defendants, and before and at the time when the plaintiff was to have dispatched the goods in execution of the said order, the said Louis Stiffel and the said other persons respectively became and were, and still continue to be, the enemies of our Lady the now Queen, by reason whereof the plaintiff could not lawfully dispatch or cause to be delivered the said goods to the said Louis Stiffel and the other persons, in the execution of the said order.

Replication—That in the declaration of war, bearing date the 28th day of March, A. D. 1854, made by her Majesty the now Queen against the Emperor of Russia, her Majesty waived her right of seizing enemies' property laden on board a neutral vessel, unless it should be contraband of

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war; and by a certain Order of her Majesty in Council, bearing date the 29th day of March, A. D. 1854, it was ordered, that Russian merchant vessels in any ports or places in her Majesty's dominions should be allowed until the 10th day of May then next, six weeks from the said 28th day of March, for loading their cargoes and departing from such ports or places; and that such Russian merchant vessels, if met at sea by any of her Majesty's ships, should be permitted to continue their voyage, if, upon examination of any of their papers, it should appear that their cargoes were taken on board before the expiration of the above term: provided, amongst other things, that nothing therein contained should extend, or be taken to extend, to Russian vessels having on board any article prohibited or contraband of war.—Averments: that the goods in the declaration mentioned were not prohibited or contraband of war, and were, long before the expiration of the said space of six weeks, delivered by the plaintiff to the said carrier to be forwarded for shipment, pursuant to the said contract; and, that the same might and could have been shipped and put on board a ship, pursuant to the said Order in Council, within the said space of six weeks, and within the true intent and meaning thereof.

Demurrer and joinder.

Gray, for the plaintiff (*Alexander* with him).—First, the plea affords no answer to the action. The contract on which the plaintiff declares is not a contract between the plaintiff and an alien enemy, but a contract between the plaintiff and the defendant, a subject of this realm. It will be argued, that the performance of the contract became illegal when the person to whom the goods were to be consigned became an alien enemy. But there is no illegality in executing a contract made with an alien, who, at the time of making it, was legally competent to contract, but who afterwards becomes an enemy. It is conceded, that it is unlaw-

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ful to trade with an enemy without a license from the Crown: *Potts v. Bell* (a); and if this contract had been made after the declaration of war, it would have been illegal. But on these pleadings it must be assumed that the goods were manufactured, and all that remained to be done was to dispatch them; and there is no illegality in delivering to an alien enemy goods manufactured under a lawful contract. Therefore, if the question depended on the plea alone, the plaintiff would be entitled to judgment. But, even if the plea is good, the replication is an answer to it. The replication sets out the Order in Council, which is tantamount to a license from the Crown to ship the goods. After that order, there was nothing to prevent the goods being delivered by shipment on board either a Russian or a neutral vessel.

Phipson for the defendant (*Keating* with him).—The plea is good, and the replication bad. The plaintiff agreed to deliver to the defendant certain goods for shipment to Odessa, and the subsequent declaration of war rendered the shipment illegal. The contract is not with the defendants, but with an alien, who afterwards becomes an enemy: the defendants only guaranteed the payment for the goods. The contract, being rendered illegal by an act of State, is dissolved, or, at all events, its performance is prohibited. *Potts v. Bell* (a) decided that it is illegal for a subject in time of war, without a license from the Crown, to bring even in a neutral ship goods from an enemy's port, which were purchased by his agent resident in the enemy's country, after the commencement of hostilities, although it may not appear that they were purchased of an enemy. That decision was founded on the case of *The Hoop* (b), in which Sir *W. Scott* explains the grounds on which trading with an enemy is interdicted.

(a) 8 T. R. 548.

(b) 1 Rob. Adm. Rep. 197.

It makes no difference that the contract was entered into before the declaration of war. In *Potts v. Bell* war had not been declared at the time the goods were purchased, though letters of marque and reprisals had been granted. The law is thus stated in *Abbott on Shipping*, p. 596, 8th ed.:—"Another general rule of law furnishes a dissolution of these contracts by matters extrinsic. If an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the government of the country, the agreement is absolutely dissolved. If, therefore, before the commencement of a voyage, war or hostilities should take place between the state to which the ship or cargo belongs, and that to which they are destined, or commerce between them be wholly prohibited, the contract for conveyance is at an end; the merchant must unlade his goods, and the owners find another employment for their ships." Also, in *Barker v. Hodgson* (a), Lord *Ellenborough*, C. J., expressed an opinion, that where the performance of a contract is rendered unlawful by the government of the country, the contract is dissolved. [*Alderson*, B.—What illegality would there be in the defendants accepting the plaintiff's draft?] The consideration for the acceptance was the consignment of the goods to Odessa, and that is prohibited. [*Martin*, B.—The Order in Council rendered the shipment legal: *Rucker v. Ansley* (b)].—The replications are bad, inasmuch as they do not shew that the goods might have been shipped, within the period mentioned in the Order, on board a Russian vessel then being in an English port. The delivery of the goods to the defendants for shipment did not make it their duty to ship them, unless they could lawfully do so; and the facts stated in the plea shew that they could not. [*Pollock*. C. B.—The

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(b) 5 M. & Sel. 25.

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Order in Council applies to enemies' property on board neutral vessels sailing to any port.] It could never have been intended to legalise a traffic with the enemy by English subjects.—He also referred to *Esposito* v. *Bowden*(a).

POLLOCK, C. B.—I am of opinion that the plaintiff is entitled to judgment. The question is, whether the contract is illegal, and therefore in law incapable of being performed. I am of opinion that it is not. Apart from the declaration of war with Russia, the case would be free from doubt. The defendants, on the plaintiff doing certain things, undertake to accept the plaintiff's draft. The plaintiff, having done those things, calls upon the defendants to perform their undertaking, when they set up as a defence the illegality of the transaction; in answer to which the plaintiff, in his replication, sets out the Order in Council. I am of opinion that the Order in Council rendered the transaction capable of being performed. The defendants might, within the time limited, have shipped the goods on board a neutral or a Russian vessel, and so have delivered them to the persons for whom they were intended.

ALDERSON, B.—I am of the same opinion. There was nothing illegal to be done by the defendants, inasmuch as they might have performed their contract without committing any illegal act.

PLATT, B.—I am also of opinion that the plaintiff is entitled to judgment. The plaintiff has performed his part of the contract, and there was no illegality in the defendants doing what was required of them. It is argued, that the declaration of war rendered the transaction illegal, but

(a) Q. B., E. T., 28th of April, 1855.

the Order in Council excepts cargoes loaded in particular vessels, and therefore the defendant might have sent the goods in that manner.

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MARTIN, B.—I also think that the plaintiff is entitled to judgment. It seems to me, for the reason already given, that there is nothing illegal in this transaction. My present impression is, that even if there had been no Order in Council, this contract might have been legally performed. Where there is a contract for the sale of goods by a British subject to an alien who is legally competent to contract, the property vests in him; and if he afterwards becomes an enemy, he still retains the property, subject to forfeiture to the Crown. That is in accordance with the doctrine laid down in Com. Dig. "Alien" (C. 2) (C. 4). Nothing but an Act of Parliament can render illegal a contract which was legal in its inception; and therefore I think that in this case the property would vest in the alien enemy, subject to forfeiture to the Crown. Then by the Order in Council the Crown, under certain circumstances, waives its right to deal with the property of the enemy. Therefore, assuming that this was a contract between the vendor and vendee, I am inclined to think that there would have been nothing illegal in performing it, unless, in the course of the voyage, the plaintiff dealt with the alien enemy (*a*).

Judgment for the plaintiff.

(*a*) This subject may be considered, first, with reference to contracts or dealings with an alien enemy; secondly, as to contracts with an alien, *unexecuted* at the time of the declaration of war; thirdly, as to executed contracts. First: all the foreign writers on international

law concur in opinion, that the immediate and necessary consequence of a declaration of war is to interdict all intercourse or dealing between the subjects of the belligerent states. That doctrine is founded on the principle, that a declaration of war puts not only the adverse go-

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vernments, in their political capacity, at war, but renders all the subjects of the one the enemies of all the subjects of the other: Vattel, bk. 3, c. 5, s. 70; Grotius, bk. 3, c. 3, s. 9; Bynkershoeck. Quæst. Jur. Pub., bk. 1, c. 3; Burlamaqui, pt. 4, c. 4, s. 20; Mably, Droit Public de L'Europe, tom. 6, p. 356, c. 11, div. 12. Vattel, indeed, goes so far as to say, "that the declaration of war authorises and even obliges every subject, of whatever rank, to secure the persons and things belonging to the enemy when they fall into his hands." Bk. 3, c. 15, s. 227: but, as observed by Sir J. Nicholl in *Potts v. Bell* (8 T. R. 554), this is by custom limited to those who have commissions from their respective governments for that purpose. By the Maritime Law, trading with the enemy without a license from the Crown has been uniformly adjudged a cause of confiscation. In the case of *The Hoop*, 1 Rob. Adm. Rep. 198, Sir W. Scott assigns, as one reason for the rule, the consequences which might follow if every person, under colour of commercial correspondence, was enabled to carry on any other species of intercourse which he might think fit. Another, but perhaps less satisfactory reason assigned, is the total inability of the enemy to enforce the contract. The learned Judge cites, as instances of the strictness of the rule, the following, among other cases:—In *The Bella Guidita*, decided in the House of Lords, on appeal, in

1785, it was held unlawful for a British subject to send supplies to the British plantations in the Granada Islands, whilst in possession of the French. In *The Elnigheid*, decided in 1795, corn had been shipped by a British and Dutch house from Rotterdam to Nantes, in December, 1792, before hostilities were declared between France and England, but from various accidental causes the ship was prevented from sailing until war had been declared, and it was held that the cargo was lawfully condemned. In the case of *The William*, decided in 1795, the claimants were British merchants residing in Grenada, who had considerable debts owing to them from French merchants in Guadeloupe, and the sugars in question had been received in payment by the agents of the claimants, and shipped on their account, but the remittance was held unlawful. Again, in the case of *The Neptune*, 6 Rob. Adm. Rep. 405, Sir W. Scott says, "It is well known, that a declaration of hostility naturally carries with it an interdiction of all commercial intercourse: it leaves the belligerent countries in a state that is inconsistent with the relations of commerce." It makes no difference that the goods were purchased before the war: *The St. Philip*, cited by Sir J. Nicholl in *Potts v. Bell*, 8 T. R. 556. And even where an Englishman attempted to remove from the enemy's country his property acquired before the war, the property was confiscat-

ed: *Juffrouw Louisa Margaretha*, cited by Sir *W. Scott*, 1 Rob. Adm. Rep. 203; 1 B. & P. 349, note: see, also, the observations of Sir *W. Scott* in *The Odin*, 1 Rob. Adm. Rep. 248; *The Cosmopolite*, 4 Rob. Adm. Rep. 8; *The Neptune*, 6 Rob. Adm. Rep. 403; *The Goede Hoop*, 1 Edw. Adm. Rep. 328. The same rule has prevailed in the common law from a very early period. In the treatise de l'Office del Admiralty, it is said, "Item soit enquis de tous ceux qui *entrecommurent*, vendent ou achètent, avec aucuns des enemis de notre seigneur Le Roi, sans license espediale du Roi ou de son admiral." 1 Roughton, art. 3, and note; Selden's note to Fortescue, De Laud Leg. Ang., ch. 32: see, also, 2 Roll. 173, pl. 3; Bro., tit. "Denizen and Alien," pl. 20. The subject was incidentally but elaborately discussed in *The East India Company v. Sands*, 10 State Trials, 371; 2 Show. 366; and it was conceded, that all contracts and dealings with an enemy were unlawful. It is singular that Lord *Hardwicke*, C., in *Henkle v. Royal Exchange Insurance Company*, 1 Ves. sen. 317, should have said, "No determination has been, that insurance on enemies' ships during the war is unlawful: it might be going too far to say, all trading with enemies is unlawful; for that general doctrine would go a great way even where only English exported and none of the enemies imported, which may be very beneficial." Also, in *Gist v. Mason*, 1 T. R. 88, Lord *Mansfield*, C. J., said,

"It is nowhere laid down that policies on neutral property, though bound to an enemy's port, are void. And, indeed, I know no cases that prohibit even a subject trading with the enemy except two, one of which is a short note in Roll. Abr. (2 Roll. Abr. 173, pl. 3), where trading with Scotland, then in a general state of enmity with this kingdom, was held to be illegal; and the other was a note (which is now burned) which was given to me by Lord *Hardwicke*, of a reference in King William's time to all the Judges, whether it were a crime at the common law to carry corn to the enemy in time of war; who were of opinion that it was a misdemeanor." With respect to this opinion of Lord *Mansfield*, *Buller*, J., said, "I more than once conversed with Lord *Mansfield* on the subject, being desirous to obtain his opinion on the legality of such insurances. On the legality, however, I could never get him to reason. He often said, that in former times it was considered for the interest of the country to insure enemies' property; and on the persuasion of its being for the interest of the country, he always discountenanced any objection on that head." *Bell v. Gibson*, 1 B. & P. 354. But, whatever doubt may have formerly existed, it is now clear that such insurances are void. In *Ex parte Lee*, 13 Ves. 64, Lord *Eldon*, C., says, "The law upon this point is now perfectly settled, and stands upon a very sound prin-

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ciple of policy, though frequently producing great hardship upon individuals; that a subject of this country shall not enter into an insurance that will have the effect of protecting the property of persons who are subjects of a country in hostility with this:” see, also, 33 Geo. 3, c. 27, s. 4; *Brandon v. Nesbitt*, 6 T. R. 23; *Bristow v. Towers*, 6 T. R. 35; *Kellner v. Le Mesurier*, 4 East, 397; *Gamba v. Le Mesurier*, 4 East, 407; *Brandon v. Curling*, 4 East. 410; *Mennett v. Bonham*, 15 East, 477; *Furtado v. Rogers*, 3 B. & P. 191; *Park on Insurance*, 13, 522; *Le Guilon*, ch. 2, s. 5; *Consulat de la Mer par Boucher*, s. 1540; *Valin. Com. liv. 3, tit. 6, art. 3*; *Emerigon*, cap. 4, s. ix. The doctrine, that war puts an end to all trading, negotiation, communication, or intercourse between the subjects of the hostile states, has been recognised and adopted in America: *Griswold v. Waddington*, 16 Johnson, 438; *S. C.*, 15 John. 37; where Chancellor *Kent*, in a most elaborate judgment, reviews all the authorities on the subject. As a consequence of that rule, it was there held, that a declaration of war operated *ipso facto* as a dissolution of a partnership then existing between two subjects of the hostile states. See, also, 1 Kent Com., Lect. 3. There is an exception to the rule in the case of ransom bills, which are contracts arising from a state of hostility: *Vattel*, bk. 3, c. 16, s. 264; *Le Guilon*, ch. 6, art. 2; *Emerigon*, ch. 12, s. 21. But

see the 22 Geo. 3, c. 25, as to the ransoming of ships or goods. Where, however, a bill of exchange was drawn by one prisoner upon another, and indorsed to an alien enemy, the latter was allowed to recover on the bill after the return of peace: *Antoine v. Morshead*, 6 Taunt. 237. It is difficult to support that decision on principle; and *Gibbs, C. J.*, in *Willison v. Patterson*, 7 Taunt. 439, treats it as an exception to the general rule, founded on necessity.

Secondly, as to contracts with an alien, *unexecuted* at the time of the declaration of war.—With the exception of the passage cited from *Abbott on Shipping*, p. 596, there is little authority on the subject; but it would seem to follow, from the rule above stated, that the declaration of war renders such contracts void. In *Brewster v. Kitchell*, 1 Salk. 198, Lord *Holt* says, “If a person covenants to do a thing which is lawful, and an Act of Parliament comes and hinders him from doing it, the covenant is repealed.” And Lord *Alvanley, C. J.*, alluding to that passage, says, “And on the same principle, where hostilities commence between the country of the underwriter and the assured, the former is forbidden to fulfil his contract. With respect to the argument insisted upon by way of answer to the public inconvenience likely to arise from permitting such contracts to be enforced, viz. that all contracts made with an alien enemy enure to the benefit of the King dur-

ing the war, and that he may enforce payment of any debt due to an alien enemy from any of his subjects; we think that it is not entitled to much weight. Such a course never has been adopted, nor is it very probable that it ever will be adopted, as well from the difficulty attending it as the disinclination to put in force such a prerogative: *Furtado v. Rogers*, 3 B. & P. 191. See, also, *Gamba v. Le Mesurier*, 4 East, 407; *Brandon v. Curling*, 4 East, 410; *Brandon v. Nesbitt*, 6 T. R. 23; *McGavon v. Stewart*, 4 Will. & Shaw, 193.

Thirdly, as to *executed* contracts with an alien.—Where there is a valid contract at the time of the declaration of war, the rights of the parties in respect of it are only suspended, and, if the Crown does not in the meantime interfere, may be enforced upon the return of peace. Thus, where an agent effected an insurance on behalf of an alien, and the loss happened before he

became an enemy, it was held that, as the contract was complete, there was only a temporary suspension of the right to sue; and that, in the absence of a plea of alien enemy, the plaintiff was entitled to recover: *Flindt v. Waters*, 15 East, 260. Lord *Ellenborough* there says, “The defence of alien enemy must be accommodated to the nature of the transaction out of which it arises; it may go to the contract itself on which the plaintiff sues, and operate as a perpetual bar; or the objection may, as in a case of this sort, be merely personal in respect to the capacity of the party to sue upon it.” On this principle, Lord *Erskine* admitted an alien enemy to prove his debt under a commission of bankruptcy: *Ex parte Boussemaker*, 13 Ves. 71. The distinction pointed out by Lord *Ellenborough* shews when the defence of “alien enemy” ought to be pleaded in *bar*, and when in *abatement*.

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The resignation for a pecuniary consideration of the position of major in a regiment in the East India Company's service, is illegal by the 49 Geo. 3, c. 126, s. 4, and security for payment of the money is void: Per *Pollock*, C. B., *Anderson*, B., *Martin*, B.—*Platt*, B., *dubitante*.

DECLARATION on a bond with condition (after reciting that the defendant had borrowed of the plaintiff 400 rupees,) for payment by the defendant to the plaintiff of the 400 rupees (366*l.* 13*s.* 4*d.*) and interest.—Breach: non-payment.

Plea.—That, before and at the time of the making of the bond, the defendant was a British subject, resident in the East Indies, holding and exercising an employment in the East India Company's service in the East Indies, that is to say, as lieutenant in the regiment of the 5th Native Cavalry (Madras), and the plaintiff was then also a British subject, and a resident in the East Indies, holding and exercising an employment in the East Indies in the service of the said company, that is to say, as senior captain in the said regiment; and that one Alexander Grant was then also a British subject, and resident in the East Indies, and holding and exercising an employment in the service of the said company in the East Indies, that is to say, as major in the same regiment; and that by a certain Act of Parliament it was enacted, amongst other things (*a*), that the demanding or receiving any sum of money, or other valuable thing, as a gift or present, or under colour thereof, whether it be for the use of the party receiving the same, or for, or pretended to be for, the use of the said company, or any other person whatsoever, by any British subject holding or exercising any office or employment under his Majesty or the said United Company in the East Indies, shall be deemed and taken to be extortion and a misdemeanor at law, and shall be proceeded against and punished as such, under and by virtue of that Act; and the offender shall also forfeit to the

(*a*) 33 Geo. 3, c. 52, s. 62.

king's majesty, his heirs and successors, the whole gift or present so received, or the full value thereof: And it was thereby further enacted (a), that the making or entering into, or being a party to, any corrupt bargain or contract for the giving up, or for obtaining, or in any other manner touching or concerning, the trust and duty of any office or employment under the Crown, or the said United Company in the East Indies, by any British subject whomsoever there resident, shall be deemed and taken to be a misdemeanor at law, and shall be proceeded against and prosecuted as such by virtue of that Act. And the defendant further says, that it was, after the coming into operation of the said Act of Parliament and whilst the said several enactments were in full force and effect, corruptly and against the form of the statute in such case made and provided, agreed by and between the plaintiff and the defendant and the said A. Grant, and divers other officers of the said regiment and in the said service subordinate to the said A. Grant, being British subjects and resident in the East Indies, and whilst they held and exercised such employments in the East Indies, that the plaintiff and the defendant and the said other officers should subscribe and pay to, and that the said A. Grant should accept from them, a certain large sum of money, to wit, as a gift or present, to wit, for his own use, to induce the said A. Grant, and on condition that the said A. Grant should thereupon give up and relinquish his said office and employment, and retire from the said regiment and create a vacancy of major therein, which office was so held by him as aforesaid, and so occasion a step for promotion in the same regiment: And the defendant says that the other said officers, and that the plaintiff for himself and for and on behalf of the defendant, and by way of loan from the plaintiff to the defendant, as hereinafter mentioned, subscribed and paid to the said

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A. Grant, and the said A. Grant then accepted from them as aforesaid the said sum of money, as a gift or present, upon the terms and conditions aforesaid; and that thereupon and in pursuance of the said agreement the said A. Grant gave up and relinquished his said office and employment and retired from the said regiment, and thereby created a vacancy therein, which vacancy thereupon, and in consequence of the said retirement, was filled up by the plaintiff, who thereupon, and in consequence thereof, became and obtained the rank of a major in the said regiment, in the place of the said A. Grant so giving up as aforesaid, and a step was consequently created in the said regiment in respect of the subordinate officers in the said regiment under the said rank of major. And the defendant further says, that before and at the time of the making of the said agreement, and before and at the time when the plaintiff contributed and paid and made such payment as aforesaid for and on behalf of the defendant and at the request of the defendant, because the defendant had not the means therewith to subscribe and contribute as aforesaid, it was corruptly, and against the form of the statute in such case made and provided, agreed by and between the plaintiff and defendant, that the plaintiff should make such payment and contribution aforesaid for the defendant by way of loan to the defendant as aforesaid, and that the defendant should execute and deliver to the plaintiff the bond in the declaration mentioned for the consideration aforesaid, and as a security for the repayment of such loan by the defendant to plaintiff. And the defendant further says, that the bond in the declaration mentioned was executed by the defendant, and delivered by him to the plaintiff, in pursuance of the premises, and upon the consideration and conditions aforesaid, and for and on account and as a security for the repayment of the said loan and payment so made by the plaintiff for the defendant as aforesaid, and on no other consideration whatsoever; and that the money

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so therein mentioned to have been borrowed, was and is the identical loan and payment so made by the plaintiff for the defendant as aforesaid, and no other. And the defendant further says, that the plaintiff, before and at the time of the making of the said bond, had full notice of and was privy to the premises in this plea mentioned.

The replication joined issue on the plea, and there was also a demurrer to the plea.

At the trial, before *Platt*, B., at the last Surrey Assizes, the plaintiff's counsel having proved the bond, the defendant's counsel, in support of the plea, put in the following admissions made by the plaintiff:—That, before and at the time of the making of the bond in the declaration mentioned, the defendant was a British subject resident in the East Indies, and a lieutenant in the Honourable East India Company's 5th regiment of Native Cavalry (Madras); and the plaintiff was then also a British subject resident in the East Indies and a senior captain in the same regiment; and that one Alexander Grant was then also a British subject resident in the East Indies and a major in the same regiment: and that it was then agreed between the plaintiff and defendant and said Alexander Grant and divers other officers of the said regiment and in the said service subordinate to the said Alexander Grant, being British subjects and resident in the East Indies, that the plaintiff and defendant and the said other officers, whilst they held commissions as such officers, should subscribe and pay to, and that the said Alexander Grant should accept from them a certain sum of money in consideration of the said Alexander Grant giving up and relinquishing his said position as major in the said regiment, retiring from the said regiment, and creating a vacancy of major therein; and so occasioning a step for promotion therein; and that the other officers, and the plaintiff for himself and for and on behalf of the defendant and by way of loan from the plaintiff to the defendant, subscribed and paid to the said Alexander

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Grant, and the said Alexander Grant then accepted from them the said sum of money upon the terms and conditions aforesaid, and the said Alexander Grant thereupon in pursuance of such agreement gave up and relinquished his said position and retired from the said regiment, and thereby created a vacancy therein, which vacancy, in consequence of such retirement, was filled up by the plaintiff, who thereupon became and obtained the rank of major in the place of the said Alexander Grant and a step was created therein; and that it was then agreed between the plaintiff and the defendant, because the defendant had not the means wherewith to subscribe and contribute as aforesaid, that the plaintiff should make such contribution by way of loan to the defendant, and that the defendant should enter into the said bond to the plaintiff for the consideration aforesaid and as the security for the repayment of such loan; and such bond was accordingly made by the defendant and delivered for the consideration aforesaid and for none other, and the money in the declaration mentioned to have been borrowed is the same money; and that of all this the plaintiff had notice.

It was objected on the part of the defendant that the transaction was illegal by the 33 Geo. 3, c. 52, ss. 62, 66, and 49 Geo. 3, c. 126, s. 4. The learned Judge doubted whether the case fell within those enactments, but was of opinion that, if it did, there was not sufficient evidence to go to the jury in support of the plea; and under his Lordship's direction a verdict was found for the plaintiff for the amount claimed.

Edwin James, in the following Term, obtained a rule nisi for a new trial, on the ground of misdirection; against which

Bramwell and *Honyman* shewed cause (May 30).—The principal question is whether the transaction stated in the

admissions is illegal by the 33 Geo. 3, c. 52, ss. 62, 66 (a), and 49 Geo. 3, c. 126, s. 4 (b). The plea is framed on the

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(a) Ante, pp. 146, 147.

(b) Section 1 recites and extends the provisions of the 5 & 6 Edw. 6, c. 16, to all offices in the gift of the Crown, "and also to all offices, commissions, places, and employments, belonging to or under the appointment or control of the United Company of Merchants of England trading to the East Indies."

Section 3 declares, that persons buying or selling, or receiving or paying money "for any office, commission, place, or employment, specified or described in the said recited Act or this Act," shall be deemed guilty of a misdemeanor.

Section 4. "That, from and after the passing of this Act, if any person or persons shall receive, have, or take money, fee, reward, or profit, directly or indirectly, or take any promise, agreement, covenant, contract, bond, or assurance, or by any way, means, or device, contract or agree to receive or have any money, fee, gratuity, loan of money, reward or profit, directly or indirectly, for any interest, solicitation, petition, request, recommendation, or negotiation whatever, made or to be made, or pretended to be made, or under any pretence of making or causing or procuring to be made, any interest, solicitation, petition, request, recommendation, or negotiation, in or about or in anywise touching, concerning, or

relating to any nomination, appointment, or deputation to or resignation of any such office, commission, place, or employment as aforesaid, or under any pretence for using or having used any interest, solicitation, petition, request, recommendation, or negotiation, in or about any such nomination, appointment, deputation, or resignation, or for the obtaining or having obtained the consent or consents, or voice or voices, of any person or persons as aforesaid, to such nomination, appointment, deputation, or resignation; and also, if any person or persons shall give or pay, or cause or procure to be given or paid, any money, fee, gratuity, loan of money, reward, or profit, or make or cause or procure to be made any promise, agreement, covenant, contract, bond, or assurance, or by any way, means, or device, contract or agree or give or pay, or cause or procure to be given or paid, any money, fee, gratuity, loan of money, reward, or profit, for any solicitation, petition, request, recommendation, or negotiation whatever, made or to be made, that shall in anywise touch, concern, or relate to any nomination, appointment, or deputation to or resignation of any such office, commission, place, or employment as aforesaid, or for the obtaining or having obtained, directly or indirectly, the consent or con-

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former Act, which is clearly inapplicable to this case. The 49 Geo. 3, c. 126, is intituled "An Act for the further prevention of the *sale and brokerage* of offices." [Pollock, C. B.—The 4th section includes the *resignation* of an office.] The object of the enactment was to prevent any undue motive operating on the mind of the patron of the office, whether arising from a gift to himself or to any person having an influence over him. The prohibition only extends to a bargain for resignation between the donor or patron of the office and the holder of it, and not to a bargain between the holder of the office and a third party. [Alderson, B.—If that were so, it would have been unnecessary to make any exception as to the sale of commissions in the army: the 7th section provides that they may be sold *sub modo*, that is, at the regulation price.] That section may have been inserted *ex majore cautela*. [Martin, B.—The 24 Geo. 3, c. 25, s. 42, also shews that this transaction is illegal.] Assuming that the statute applies to a bargain for resignation between the holder of the office and a third person, this is not a transaction within it. Though the plaintiff left the regiment, he nevertheless retained his commission as major. There was therefore no resignation of his office within the meaning of the Act.—They also argued

sents, or voice or voices, of any person or persons as aforesaid, to any such nomination, appointment, deputation, or resignation; and also, if any person or persons shall, for or in expectation of gain, fee, gratuity, loan of money, reward, or profit, solicit, recommend, or negotiate, in any manner, for any person or persons, in any matter that shall in anywise touch, concern, or relate to any such nomination, appointment, deputation, or resignation

aforesaid, or for the obtaining, directly or indirectly, the consent or consents, or voice or voices, of any person or persons to any such nomination, appointment, or deputation, or resignation aforesaid, then, and in every such case, every such person, and also every person who shall wilfully and knowingly aid, abet, or assist such person therein, shall be deemed and adjudged guilty of a misdemeanor."

that the admissions did not prove the plea, citing *Regina v. Charretie* (a).

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Edwin James and *Lush* appeared to support the rule but were not called upon.

Cur. adv. vult.

POLLOCK, C. B., now said—This was a motion for a new trial on the ground of misdirection. The action was on a bond conditioned for payment of a sum of money ; and the foundation of the transaction was this :—The plaintiff and defendant were officers in a regiment in the East India Company's service, and the major in the same regiment agreed with the plaintiff and the defendant and the other junior officers to relinquish his position in the regiment as major, by which every one of his junior officers would acquire a step in the regiment ; and in consideration of his so doing they agreed to give him a certain sum of money ; and the amount which was to be paid by the defendant was lent to him by the plaintiff on the security of the bond in question. The defendant pleaded that the transaction was illegal. At the trial, certain admissions were put in on behalf of the defendant. The learned Judge thought that the admissions did not prove the plea, and he entertained some doubt whether, if they did, the plea afforded an answer to the action. There was a demurrer to the plea as well as a traverse ; and the learned Judge did not reserve any point of law, perhaps, because he thought the question open on the demurrer. This Court having granted a rule nisi for a new trial, and the demurrer having been set down for argument, it was agreed that both should be heard together ; and on the argument, the Court having entertained an opinion adverse to the plaintiff, intimated to the defendant's counsel that they would hear them if neces-

(a) 13 Q. B. 447.

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sary, The plea professed to be founded on the 33 Geo. 3, c. 52, ss. 62, 66 (the East India Company's Act), and it did not mention the 49 Geo. 3, c. 126, by which the sale of all offices is prohibited, with certain exceptions; and by which also the resignation of an office for a pecuniary consideration is rendered illegal and a misdemeanor. We have considered the case, and are all of opinion that the transaction as stated in the plea is illegal, and that therefore the plea is an answer to the action. There must however be a new trial, for the purpose of enabling the defendant to take the opinion of a jury, as to whether or no the plea was proved; but upon the demurrer, our judgment is for the defendant.

It appears to me that this transaction is neither more nor less than the giving to a person, holding a situation in the East India Company's service, a consideration to resign his position or office in that service. The major of a regiment is in a different position from a major in the army unattached. A majority in a regiment is a place or position in the regiment. It was contended, on the part of the plaintiff, that the giving up his position as major in the regiment did not alter his position at all: I cannot accede to that. There is regimental rank, and rank in the army. A person may be a captain unattached; he may also be a captain attached to a particular regiment; and he may give up the one without abandoning the other. In the present case, the plaintiff undertook to give up his majority in the regiment in consideration of a sum of money promised to him for that purpose; and in my opinion such a transaction is illegal. It is a resignation within the 4th section of the 49 Geo. 3, c. 126, which pronounces not only the sale, but also the resignation, and the *procuring the resignation*, of any office for money to be illegal. Mr. Bramwell contended that we ought to put a construction on the Act of Parliament merely to this extent—that if the resignation was procured by the person who had power to appoint the

successor, it would be illegal ; but if procured by anybody else, it would be perfectly legal. I cannot adopt that view of the subject. It appears to me that it would be taking a very narrow and imperfect view of the mischief to be suppressed by the Act of Parliament, if we were to hold that the procurement of the resignation by the person who has the patronage of the office would alone be illegal, and that if procured by any other person,—for instance, the intended successor,—it would be free from blame. The mischief is two-fold. If a person is to be remunerated for an office so that he can afford to buy out the holder and create a vacancy, (which possibly even by merit he may be entitled to fill,) he is paid more than is necessary for the public service, and all that he takes beyond that, and by which he is enabled to remunerate the person who retires from the service, is really taken from the public without adequate consideration. So also with respect to the person retiring : the East India Company pay to this major, when he retires, a certain pension or allowance in proportion to his pay. If he would not receive it except for the premium offered to him to induce him to resign, the consequence would be that he would remain in the service of the company ; but if some one gives him a sum of money to retire, then he resigns, not because there is a proper reason for his retirement, but for the pecuniary consideration. Now there are two cases to be found in the books, not indeed directly in point, but which I think it right to advert to as shewing that the principle is not new. In the case of *Parsons v. Thompson* (a), which was decided before the 33 Geo. 3, c. 52, passed, the plaintiff held the office of master joiner in a dockyard, and he made an agreement with the defendant that he would procure himself to be superannuated. I take it for granted that he was entitled by length of service to be superannuated if he applied for it ; but no doubt the superannuation would not have been so

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(a) 1 H. Black. 322.

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beneficial to him in point of money as if he remained in the office; he therefore made an agreement with the defendant that if he procured himself to be superannuated and the defendant succeeded him, that then the defendant would allow him his extra pay from the yard books, exclusive of the superannuation money, during his life. It was contended that the agreement was illegal, and the Court were of that opinion. Lord *Loughborough*, who delivered the judgment, says, "Every action on promises must rest on a fair and valuable consideration, which it is for the plaintiff to make out. What is the consideration stated here? That the plaintiff represented himself as unfit for future service, and entitled to a pension for the past. This he did at the request of the defendant, on the promise from him of a certain allowance. Now the representation was either true or false. If true, there was no ground for any bargain with the defendant: the plaintiff did nothing for the defendant; all he did was for his own ease and advantage. If false, the public is deceived, the pension misapplied, and the service injured." Then in the judgment several authorities are cited in support of the view taken by the Court. That case certainly went beyond the present; there the plaintiff was not entitled to be superannuated without an application for that purpose; and I think that an application to be superannuated ought to be founded solely on the title of the party to have the relief which he asks for. In the present case the plaintiff was, I believe, entitled to retire with a certain portion of his pay. Then this agreement gave him a motive to retire, which he would not otherwise have had. There is also a case of *Hopkins v. Prescott* (a), where, by an agreement, after reciting that the plaintiff had carried on the business of a law-stationer at G., and also had been subdistributor of stamps, collector of assessed taxes, &c. there, and that he had agreed with

(a) 4 C. B. 578.

the defendant for the sale of the said business, and of all his good-will and interest therein to him for the sum of 300*l.*, the plaintiff, in consideration of the said sum of 300*l.*, agreed to sell, and the defendant agreed to purchase, the said business of a law-stationer at G.; and it was further agreed that the plaintiff should not, at any time after the 1st of March then next, carry on the business of a law-stationer at G. or within ten miles thereof, or collect any of the assessed taxes, &c., but would use his utmost endeavours to introduce the defendant to the said business and offices; and that agreement was held to be illegal and void within the 5 & 6 Edw. 6, c. 16, and 49 Geo. 3, c. 126. I mention this case chiefly for the purpose of stating that Mr. Justice *Coltman*, in concurring with the rest of the Court, that the agreement was illegal, says, "If this contract were not made void by statute, I still think it would be void at common law, upon the principle laid down by Lord *Thurlow* on granting a perpetual injunction: *Hunington v. Du Chatel* (a), viz. that contracts for the sale of offices of this sort are contrary to public policy." The judgment of the Court upon the demurrer will be for the defendant; and the rule will be absolute for a new trial.

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ALDERSON, B.—I am of the same opinion.

PLATT, B.—It appeared to me at the trial that there was no evidence for the jury in support of the plea; but as the other members of the Court entertain a different opinion and no point was reserved, the rule must be absolute for a new trial. With regard to the plea itself another question arises. If the plea had been proved in its terms, I am inclined to think that it would be a good answer to the action. I am not, however, very firmly of that opinion; because it must be recollected that the particular

(a) 1 Bro. C. C. 124; and see 12 Rich. 2, c. 2.

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office or position bargained for was not in the appointment of the East India Company. That has been the doubt which I have entertained throughout, but still I express that doubt cautiously, because I may be wrong. The 49 Geo. 3, c. 126, applies to all "offices, commissions, places, and employments belonging to or *under the appointment or control* of the United Company of Merchants of England trading to the East Indies." Now the position of major-captain, or any other officer above the first step, that of a cadet, goes by rotation, not by appointment. The Act of Parliament seems to me to be directed principally to those cases where the East India Company has the power of appointment; and though the word "control" is used as well as "appointment," I think that word does not apply here. This I merely express as a doubt upon the subject; and as the other members of the Court are of opinion that the case falls within the Act of Parliament, I agree that the judgment on the demurrer must be for the defendant.

MARTIN, B.—I am also of opinion that this is a good plea. The declaration is on a bond conditioned for payment of a sum of money; and the plea states that the circumstances under which the bond was made were these: —(His Lordship stated the plea.)—I apprehend that there is no clearer proposition in law than this, that if a payment of money be illegal by the terms of an Act of Parliament, a bond or any other security for the payment is illegal also. The question therefore arises whether or no this was an illegal transaction. The plea is framed on the 33 Geo. 3, c. 52, the East India Company's Act; and it is perfectly clear that the sections set out in the plea do not support it. But it was said, and with truth, however inconvenient it may be, that if a transaction such as that contained in this plea is illegal by virtue of any other Act of Parliament, the defendant is entitled to rely on it; and consequently two other Acts have been cited for the pur-

pose of shewing that this transaction is illegal; the 24 Geo. 3, c. 25, and 49 Geo. 3, c. 126. The 24 Geo. 3, c. 25, is one of the East India Company's Acts, and by the 42nd section it is enacted, "That from and after the commencement of this Act, all promotions and advancement of the officers and servants of the said United Company in India, as well civil as military, in their respective lines or professions, under the degrees of the respective councilors and commanders-in-chief, shall be made according to the seniority of appointment in a regular successive progression, unless any of the said governments and presidencies shall, on any very urgent occasion, by a vote in council, see cause to deviate from the said general rule hereby directed to be observed." Therefore, whether it be good or bad policy, it is clear that according to the law, the East India Company are bound to promote persons in their service according to seniority; and perhaps, if the provisions of that Act alone were to be considered, it might have turned out that this was an illegal transaction under that Act. But it seems to me, that under the terms of the other Act there can be no doubt at all. The 49 Geo. 3, c. 126, begins by reciting the 5 & 6 Edw. 6, c. 16, which appears to be directed against the sale of all offices. That however was found not to be so, and the 49 Geo. 3, c. 126, extended the 5 & 6 Edw. 6, c. 16, to all commissions, civil, naval, and military, in the gift of the Crown; and also to "all offices, commissions, places, and employments belonging to or under the appointment or control of the 'United Company of Merchants of England trading to the East Indies.' Now the first question is, whether or no this is a commission with an appointment made by the East India Company. That is a matter on which there is no doubt, for the appointment is under the seal of the East India Company and signed by the commander-in-chief and three of the commissioners in council. It is said that the statute does

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not apply to the sale of a commission of this kind ; but the statute says that it shall extend to all commissions, and there is an exception as to the sale of those in the Queen's army at the regulation prices ; and, by section 8, any person paying more than those prices is liable to a penalty of 500*l*. Therefore, there can be no doubt that this statute does extend to commissions in the army, and there is no exception with respect to the Indian army. It is unfortunate for the plaintiff, as it has been said, that this is a common and usual transaction ; and certainly a person who has entered into a contract of this kind and obtained a benefit by it, comes with a bad grace to resist it. It is important that the attention of all persons should be called to this Act of Parliament, for it is clear that where there is any traffic with respect to almost any office whatever, the transaction is not merely void, but in a great majority of cases, the persons so trafficking are guilty of a misdemeanor. Some benefit may arise from its being known that such an Act exists. For these reasons I am of opinion that the plea is good. With respect to the other point, I agree that there ought to be a new trial.

Rule absolute for a new trial.—Judgment
for the defendant on the demurrer.

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May 28.

DECLARATION by indorsees against maker of six promissory notes.

Plea:—That the supposed causes of action in the declaration mentioned did not, nor did any or either of them, accrue to the plaintiffs at any time within six years next before the commencement of this suit.

Replication:—That at the time when the said causes of action did accrue the defendant was in parts beyond the seas, and not in the United Kingdom of Great Britain and Ireland, or in the Islands of Man, Jersey, Guernsey, Alderney, and Sark, or either of them, or any island adjacent to any or either of them; and that the defendant did not, at any time between the time when the said causes of action accrued and six years before the commencement of this suit, ever come or return into the said United Kingdom, or any or either of the said islands; and that the defendant continued in such parts beyond the seas until within six years before the commencement of this suit.

Demurrer and joinder therein.

Quain in support of the demurrer.—The replication is bad for not alleging that the defendant has returned to this kingdom, and that the action was commenced within six years after his return. By the 21 Jac. 1, c. 16, s. 3, actions of debt must be brought within six years next after the cause of action accrued. By section 7, where any person is under disability or beyond the seas, he may bring his action within six years next after the removal of the disability or return from beyond seas. That enactment provided for plaintiffs only; therefore, before the 4 Ann. c. 16, a defendant might avail himself of the limitation whether

A replication, under the 4 Ann. c. 16, s. 19, to a plea of the Statute of Limitations, need not allege that the defendant has returned to this country, or that the action was commenced within six years after his return.

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abroad or not; and in order to prevent its operation it was necessary for the plaintiff to issue a writ and enter it with continuances on the roll, or proceed to outlawry. That state of things continued until the 4 Ann. c. 16, the 19th section of which provides, that if any person or persons against whom there shall be certain causes of action shall be, at the time the cause of action accrued, beyond the seas, "that then such person or persons, who is or shall be entitled to any such suit or action, shall be at liberty to bring the said actions against such person and persons after their return from beyond the seas, so as they take the same after their return from beyond the seas, within such times as are respectively limited for the bringing of the said actions before by this Act, and by the said other Act made in the 21 Jac. 1." That enactment makes the return of the defendant and the commencement of the action within six years afterwards conditions precedent to the right to maintain it. Those facts ought therefore to have been alleged in the replication. The precedents contain averments to that effect: Chit. Plead. vol. 3, p. 442, 7th ed. [*Alderson*, B.—The statute does not say that the plaintiff shall not bring his action before the defendant's return, but only that he must bring it within six years after the defendant's return. *Pollock*, C. B. The replication says that when the cause of action accrued the defendant was abroad, and he continued there until within six years before the commencement of the suit: that is an imperfect mode of saying that he returned within six years before action brought.]

Willes, contra.—The rule is, that when once the statute begins to run nothing can arrest its course; but according to the argument on the other side, the plaintiff has first a period of six years within which he may bring his action; then there is a further period of six years which is to begin at a future time, namely, when the defendant returns from abroad; but between the first and second there is an inter-

mediate period, during which he can maintain no action. The 4 Ann. c. 16, is in *pari materia* with 21 Jac. 1, c. 16, which contains a similar exception as to plaintiffs under disability or beyond the seas, and enables them to bring their actions within the time limited after the removal of the disability or return from beyond the seas: sect. 7. In the construction of that statute it has been held, that where a person died abroad to whom a right of action had accrued during his residence there, and he never returned to this country after the accrual thereof, his executors might sue for it, although more than six years had elapsed since it accrued: *Townsend v. Deacon* (a). A similar construction should be put on the exception, as to defendants abroad, in the 4 Ann. c. 16, s. 19. Statutes of Limitation were intended to fix the time after which a party should not sue. The authorities are collected in Robinson's Practice in England and the United States, p. 618.

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Quain in reply.—The 4 Ann. c. 16, gave to plaintiffs a new right, subject to certain conditions. [*Pollock*, C. B. Suppose the case of an infant who has a cause of action, is he obliged to wait until he is of age before he can bring his action?] The case of *Townsend v. Deacon* (a) is in the defendant's favour, for an executor represents his testator, and therefore when the executor is in England, it is the same as if the testator had returned.

POLLOCK, C. B.—We ought to put the same construction on the 4 Ann. c. 16, s. 19, as has been put on the 21 Jac. 1, c. 16, s. 7; and the case of *Townsend v. Deacon* certainly justifies a departure from the strict language of the statute, because if an action may be brought by the personal representative of a person who has never returned from abroad, it follows in this case, that although the defendant has

(a) 3 Exch. 706.

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never returned he is liable to be sued, yet that is inconsistent with the notion that the 4 Ann. c. 16. s. 19, gives a new cause of action on the defendant's return. No doubt the argument of Mr. *Quain* is, as to the letter, perfectly correct; and if the statute is to be construed without reference to the subject matter or other statutes and decisions, and without regard to the construction which should be given to it in order to make it consistent with law and common sense, his argument ought to prevail. If the mere language is to be taken without reference to its meaning and general intention, it would certainly seem as if the being at liberty to bring an action *after the defendant's return* was inconsistent with the power to bring it before his return. But that is not the mode of ascertaining the meaning of the legislature, for *Townsend v. Deacon* proves that a plaintiff's executor may sue in this country though the plaintiff never returned; and it follows by necessary analogy, that, though this defendant had never returned, yet if any one had proved his will the plaintiff might have sued that personal representative; and it would be very strange if a personal representative might sue and be sued, and yet the party himself could not. In the case, which I suggested, of an infant, can it be said, that, if his guardian does not sue, the infant must wait until he is of age? The construction of the statute which I adopt is this:—the plaintiff shall have, for the purpose of suit, any time not exceeding six years from the return of the defendant to this country; but if he chooses to sue the defendant before his return, he may take that course. Besides, as I observed during the argument, I think that the allegation in the replication is an imperfect mode of saying that the defendant has returned, and which would formerly have been bad on special demurrer. Our judgment must therefore be for the plaintiff.

ALDERSON, B.—According to the true construction of the statute, the one party is not barred of his action unless the

other party has returned and six years have elapsed since his return. Then, here the plaintiff is not barred, either because the defendant has not returned or because six years have not elapsed since his return,—which it does not appear by the record, but that is immaterial. If the word “within” be read as “not longer than,” which I think it ought to be, all difficulty is removed.

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PLATT, B.—The replication is framed in a different way from the precedents in order to meet the very case of a defendant who has not returned (a). In construing these statutes, we must see what is the limit within which an action may be brought. If the plaintiff is abroad when the cause of action accrued, he has six years from his return, though that may not be for ten or twenty years; but he is not prevented from bringing his action before his return. So if the defendant is abroad, the limitation does not begin to run until six years after his return, but the plaintiff is not obliged to wait until his return.

Judgment for the plaintiff

(a) See *Forbes v. Smith*, 10 Exch. 717.

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May 23, 25.

FORBES and Others v. MARSHALL.

The directors of a joint-stock bank issued instruments in the following form:—

"Union Bank Post Bill.—At sixty days after sight of this our first bill of exchange (second and third of the same tenor and date not paid), We promise to pay, on account of the proprietors of the Union Bank of Calcutta, to the order of C. L. & Co., the sum of company's rupees, ten thousand.

Value received. (Signed), J. R., W. G., directors."

By their deed of settlement, the business of the company was to consist in issuing promissory notes, payable to bearer on demand, for any sum not less than eight company's rupees, and not exceeding one thousand, and bills of exchange payable, at such time after date or sight as the directors should fix, to parties who should require the same and deposit the amount of such bills in the bank, and in all other branches of business usually transacted by bankers in Calcutta. It was also provided, that no promissory notes or bills of exchange should be issued otherwise than of the description and in the manner above mentioned. In an action by an indorsee of the above instrument against a shareholder in the bank:—*Held*, first, that the directors had power to bind the shareholders by issuing instruments of that description; secondly, that they were in a form which bound the shareholders; thirdly, that they were substantially made in the name of the partnership firm.

Seemle, that such instruments may be declared on, either as promissory notes or bills of exchange.

THE first count of the declaration stated, that the defendant, on &c. at Calcutta, in the East Indies, made his promissory note in writing, and thereby promised, sixty days after sight, to wit, at the Union Bank of Calcutta, of that his first (second and third of the same tenor and date not paid), to pay to the order of certain persons therein named and described as Messrs. Cockerell, Larpent, & Co., the sum of 10,000 company's rupees; and the said Cockerell, Larpent, & Co. by that name then indorsed the said note to the plaintiffs; and the defendant then had sight of the said note, to wit, at the said Union Bank of Calcutta, and sixty days after sight thereof, and the time for payment thereof, elapsed before this suit.—Averment: that the sum of 10,000 company's rupees was at the time the note fell due, and ever since, of the value of 1000*l.* of English money.—There were five other counts on similar notes.

Plea—That the defendant did not make the notes.

At the trial, before *Pollock*, C.B., at the London Sittings after last Michaelmas Term, it appeared that the action was brought by the plaintiffs as indorsees of six of the following instruments, which were signed by two directors of, and issued by, the Union Bank of Calcutta:

"Union Bank Post Bill .

"No. 445.

Calcutta, 1st July, 1847.

Co.'s Rupees 10,000

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"At sixty days after sight of this our first Bill of Exchange (second and third of the same tenor and date not paid), We promise to pay on account of the Proprietors of the Union Bank of Calcutta to the Order of Messrs. Cockerell, Larpent, & Co., the sum of Company's Rupees Ten thousand: Value received.

"H. W. ABBOTT,

"Secretary.

"J. RENNYE,

"W. P. GRANT,

} Directors.

"(Indorsed)

"Pay to Messrs. Forbes, Forbes, & Co.

"Cockerell, Larpent, & Co."

The defendant became a shareholder in the Union Bank of Calcutta, in July, 1844, and so continued until January, 1848, when the bank failed. During that period and prior thereto, the bank had issued instruments in the above form to a large amount, as part of their ordinary business. It was also proved that the Bank of England ever since the year 1788 had issued similar instruments, and that the Bank of Bengal for many years past had done so. The defendant had executed the deed of settlement of the Union Bank of Calcutta, which was dated the 1st August, 1839, and contained the following provisions:—

"1.—That the business and concerns of the said Company shall consist in issuing promissory notes payable to bearer on demand, at their office in Calcutta, for any sum of not less than 8 company's rupees, and not exceeding 1000 company's rupees, and bills of exchange payable, at such time after date or sight as the directors for the time being shall fix, to parties who shall require the same and deposit the amount of such bills in the said bank, which deposit shall bear interest at such rate as the directors shall fix; and also in discounting bills and promissory notes not having a

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longer period to run than 4 months from the time of discounting the same respectively ; and also lending money on the security of personal property for any period not exceeding four months, or on cash accounts to persons depositing undoubted security ; such accounts to be settled at the end of every three months ; and in all other branches of business usually transacted by bankers in Calcutta."

"2.—That no promissory notes shall be issued to an extent exceeding 20 lakhs of company's rupees, or exceeding 25 per cent. of the paid up capital of the bank, in case the capital shall hereafter be increased beyond 80 lakhs of company's rupees : that no promissory notes or bills of exchange shall be issued, nor bills or notes discounted, nor money lent, otherwise than of the description and in the manner above mentioned."

"37.—That the directors of the said company for the time being are hereby expressly invested with full power and authority to superintend, order, regulate, and manage all and singular the affairs and business of the said company to the best of their discretion and judgment, under and subject to the provisions herein contained."

"39.—That two of the directors shall transact the daily business of the bank, and that a meeting of the whole of the bank directors for the time being shall be held at the bank once in every week."

It was objected on behalf of the defendants, first, that the directors had no power to bind the shareholders by issuing notes of the above description, and that there was no sanction or ratification of this course by the defendant: secondly, that these notes bound the directors only, and not the shareholders: thirdly, that they were not made in the name of the firm (a). A verdict was entered for the plaintiffs for the

(a) It was also objected that these instruments were bills of exchange, and should have been declared upon as such ; but no motion was made on this ground.

amount claimed, leave being reserved to the defendant to move to enter a verdict for him; the plaintiff to be at liberty to amend the declaration if necessary.

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Sir *F. Thesiger*, in the following Term, obtained a rule *nisi* accordingly upon the above grounds; against which,

Willes and *Bovill* shewed cause.—First, the directors had power to bind the shareholders of the bank, by issuing notes of this description. There was evidence that it was in the ordinary course of business for bankers to issue bank post bills, and moreover the deed of settlement authorises the directors to do so. As a general rule, one partner has authority to bind his copartners by all contracts necessary or usual for carrying on the partnership business; and any agreement between the parties themselves respecting their liability is wholly inoperative as against third parties, unless they are aware of it: *Hawken v. Bourne* (a). It will be argued, however, that this being a joint-stock company, the liability of its members depends on the language of the deed of settlement: *Bramah v. Roberts* (b). But it makes no difference in point of law whether the partners themselves conduct their business, or delegate their authority to others. The directors were the agents of the company for transacting its ordinary business, and in doing so, it was necessary that they should make these notes. The defendant is bound by the acts of the persons whom he appointed to carry on the business. They acted in the ordinary course, and the plaintiffs had no means of knowing whether they were authorised to issue the notes. *Smith v. The Hull Glass Company* (c) shews that, in this respect, there is no distinction between the liability of partners in joint-stock trading companies and partners in ordinary partnerships.

(a) 8 M. & W. 703. (b) 3 Bing. N. C. 963. (c) 11 C. B. 897.

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In *Hallett v. Dowdall* (a), *Martin, B.*, says—"It seems clearly established by the authorities, that with respect to third persons who have no notice of the terms of the partnership, the shareholders and partners in joint-stock companies are liable to the same extent and in the same manner as the partners in ordinary partnerships; and that the law pays no regard to the stipulations contained in the partnership deed as to the restriction of liability, or to any particular provisions as to the mode of carrying on the business different from that ordinarily used in such concerns." In *Greenwood's case* (b), *Lord Cranworth, C.*, recognises that principle; and *Sir G. Turner, L. J.*, says:—"There may be debts contracted and engagements entered into by the directors of these companies which are wholly beyond their authority, and by which, therefore, the shareholders may not be bound; but I do not think that the shareholders of these companies can exonerate themselves from the claims of creditors merely by provisions purporting to restrict their liability." The same doctrine was propounded in *The Bank of Australasia v. Breillat* (c). The directors, therefore, had power to issue bills and notes, independently of the deed, for the very nature of the business for which the company was established required that they should do so. Moreover, the defendant, by becoming a shareholder in the company, has ratified and sanctioned the act of the directors in issuing these notes. But further, assuming that the directors could only act within the strict terms of the deed, it gave them authority to bind the shareholders, by issuing these notes. *Thompson v. The Wesleyan Newspaper Association* (d) shews that the substance of the authority must be looked at. Clause 2 of the deed provides, that no promissory notes or bills of exchange shall be issued, otherwise

(a) 18 Q. B. 251.

(b) 3 De G., Mac., & G. 459.

(c) 6 Moore P. C. 152

(d) 8 C. B. 849.

than of the description and in the manner mentioned in the first clause. By that clause, the business of the company shall consist in issuing promissory notes, payable to bearer on demand &c., and in *all other branches of business usually transacted by bankers* in Calcutta. Under the latter words, the directors had authority to issue bank post bills. They might have bound the company by accepting bills drawn by a third person at sixty days after sight; and it is immaterial that the instruments which they have accepted were in the form of bank post bills. They either come within the definition of bills or notes, or, if not, this is merely the case of a departure by a general agent from the form and not the substance of his authority. The restriction in clause 2 only applies to promissory notes payable to bearer on demand. The two clauses may be reconciled by reading the words in clause 2, "no *such* promissory notes."

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Secondly; these notes are in a form which bound the shareholders. They are headed, "Union Bank Post Bill," and the directors promise to pay "on account of the proprietors." If the form had been, "we promise on account of the proprietors of the Union Bank to pay," there could have been no question. In *MacLae v. Sutherland* (a), the promissory notes were in this form:—"We, directors of the Royal Bank of Australia, for ourselves and the other shareholders of the said company, jointly and severally promise to pay" &c., and it was held that the shareholders were jointly bound. In *Allen v. The Sea Fire Insurance Company* (b), a document, signed by two directors of a joint stock company and directed to their cashier, was in the following form:—"Ninety days after date credit Mrs. A. Allen, or order, with the sum of 311*l.* claims per Susan King, *in cash*, on account of this corporation,—and that was held to be a promissory note, and binding on the company, though it might not have been issued so as to bind the shareholders under the deed of settlement.

(a) 3 E. & B. 1.

(b) 9 C. B. 574.

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Thirdly; it is objected that the notes cannot bind the shareholders because they are not made in the name of the firm. No doubt the principle of law is, that one partner has no authority to bind his copartners by a bill or note, except in the partnership name: *Kirk v. Blurton* (a). But in these cases the question is whether the instrument substantially describes the form: *Faith v. Richmond* (b), *Williamson v. Johnson* (c). Here the notes are in a form used by the company at the time the defendant became a shareholder.

Sir F. Thesiger and Bramwell in support of the rule.—First, it is said that independently of the deed of settlement the defendant is liable, because the issuing of these notes was a transaction in the ordinary course of banking business; but the evidence on that subject was confined to the Bank of England and the Bank of Bengal, and those instances are not sufficient to establish an ordinary course of business amongst bankers. It will be necessary, therefore, to resort to the deed of settlement in order to ascertain the power of the directors to bind the shareholders: *MacLae v. Sutherland* (d).—The defendant is sued as the maker of a promissory note which he has not himself made, and therefore the authority to make it for him must be shewn. In the case of an ordinary partnership, each partner has an implied authority to bind the others by entering into contracts within the scope of the partnership business, and it is immaterial as regards those persons that they have prohibited him; but in the case of a joint stock company no such implication arises, there certain powers are delegated to the directors, and the shareholders are not bound unless the deed of settlement authorises them to make the contract: *Bramah v. Roberts* (e), *Ridley v. The Plymouth Grinding and Baking Com-*

(a) 9 M. & W. 284.

(b) 11 Ad. & E. 339.

(c) 1 B. & C. 146.

(d) 3 E. & B. 1.

(e) 3 Bing. N. C. 963.

pany (a), *Kirk v. Bell* (b), *The Bank of Australasia v. Breillat* (c). In *Smith v. The Hull Glass Company* (d), the goods were supplied for the purpose of the manufacture for which the company were established, and therefore the manager had an implied authority to bind the company by ordering them. Every one who dealt with this company must have known that no common law authority existed, and that the power of directors to bind the shareholders depended on the terms of the deed of settlement: *Thompson v. The Wesleyan Newspaper Association* (e). At all events, the directors would only have an implied authority to issue such instruments as were ordinarily issued by private banking copartnerships. The mere fact that the directors issued notes of this kind at the time the defendant became a shareholder, will not render him liable. Where directors exceed their authority, the shareholders are not liable unless with full knowledge they ratify the irregular act. In *MacLae v. Sutherland* (f), the shareholders had acquiesced in what was done by the directors, and so were taken to have ratified it. Here the defendant would not be bound to look beyond the deed of settlement; and as to other matters, distinct notice must be proved. Then does the deed of settlement authorise the directors to bind the shareholders by issuing bank post bills? These instruments are, substantially, promissory notes, and the deed of settlement restricts the issuing of promissory notes, except of a certain description and amount with reference to the capital of the company. That provision is not in restriction of the liability of the partners, but of the particular business to be carried on. It is clear from the observations of Sir G. Turner, L. J., in his judgment in *Greenwood's case* (g), that where directors of a company enter into contracts beyond their authority,

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(a) 2 Exch. 711.

(b) 16 Q. B. 290.

(c) 6 Moore P. C. 152.

(d) 11 C. B. 897.

(e) 8 C. B. 849.

(f) 3 E. & B. 1.

(g) 3 De G., Mac., & G. 459.

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the shareholders are not bound. [*Pollock*, C. B.—The restriction may be directory only.] It may be directory in the first clause, but it is prohibitory in the second. [*Al-derson*, B.—Ought not the clauses to be construed with reference to those instruments which are properly, and on the face of them, bills of exchange or promissory notes ?] In that view there would be no authority to issue instruments of this kind.—Secondly, these are notes which bound the directors only who made them, and not the shareholders: *Penkivil v. Connell* (a). They contain an absolute promise on the part of the directors to pay: "on account of the proprietors," is merely a direction as to the account to which the payment is to be debited. In *Allen v. The Sea Fire Insurance Company* (b), the directors were empowered by the deed of settlement to issue promissory notes.—With respect to the third point, *Kirk v. Blurton* (c), is an express authority that one partner cannot bind his copartners by the acceptance of a bill of exchange, unless it be in the name of the firm. These *Rolfe*, B., says "The law seems to be perfectly reasonable ; it implies no authority to bind the partnership in any other name than that held out to the world as the name of the firm." The defendant by executing the deed of settlement stipulated that he is not to be bound except by the partnership name. If any alteration be allowed it might be extended until a totally different name is substituted.

POLLOCK, C. B.—We are all of opinion that the rule ought to be discharged. The action is brought on six promissory notes or bills of exchange, and the objections raised at the trial consisted of four points, of which three only have been brought under the consideration of the Court. I reserved the points not so much from any difficulty which I enter-

(a) 5 Exch. 381.

(b) 9 C. B. 574.

(c) 9 M. & W. 284.

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tained, but because it was conceded by the counsel on both sides that the case ought to be taken to the Court above, since the amount in dispute was considerable. Accordingly, a motion was made in last Hilary Term to enter the verdict for the defendant, and a rule nisi was granted on three points: first, that the directors had no power to bind the shareholders by issuing these notes; secondly, that they were not in a form to bind the shareholders; and thirdly, that they were not made in the partnership name. I am of opinion that, under the terms of the deed of settlement, the directors had power to issue these notes; that they are not within the prohibitions of the deed; and, that it was not intended to exclude them. The deed gave the directors power to carry on the business of banking in the way in which it was usually carried on, and there was evidence at the trial which satisfies me, that the course of business which prevailed in this company was that which prevailed in all other banks where these documents were issued. I also think that these documents may be called either promissory notes or bills of exchange; and if they had been declared upon as bills of exchange, we should probably have held them to be so. I am inclined to think that they are rather bills of exchange than promissory notes, and indeed they are so called. A similar form has been long used by the Bank of England for bank post bills, and in which they are also called bills of exchange. I am therefore of opinion that the directors had power to bind the shareholders by issuing these notes. Then with respect to the form of the note, looking at the document itself, rather for the purpose of ascertaining what the parties really meant, and what the mercantile world would understand by it, I entertain no doubt whatever that it professes to be an instrument issued by certain directors not only on behalf and on account of the company, but that it was meant by that instrument to bind the company itself as much as if it had said so in express terms. Further, it is said that these notes were not made

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in the name of the partnership firm. But I am of opinion that the name which is used on the face of the instrument is substantially the name of the firm, and that is sufficient. It has been argued, that, if any alteration be allowed, it might go on until a totally different name was substituted. But, if Calcutta had been spelt with a K instead of a C, could any one doubt that the company would have been bound? The real question is this: is the Company sufficiently designated, so as to leave in the mind of nobody any reasonable doubt as to what is meant? If so, the name of the company is substantially used, and they are bound by it. For these reasons, I am of opinion that the directors had power to issue these notes, that they have made them in a form by which everybody would understand that they were made on behalf and on account of the company, and that the name which is used is substantially the name of the partnership firm.

ALDERSON, B.—I am of the same opinion. With respect to the last point, the question is, whether the directors have in truth used the name of the company; for, if so, they have bound the company. The rule is, that one partner may bind the firm by his signature to a bill, provided he uses the partnership name. Here the directors profess to bind the firm, by saying that they promise to pay on account of the firm, and they use the name of the firm. It is not like the case of *Kirk v. Blurton* (a). There the two defendants, Blurton and Habershon, carried on business in partnership, under the name of "John Blurton." Habershon, who drew the bill, did not sign his own name to it. Then, if he meant to bind the partnership, he should have used the partnership name; but, instead of that, he signs "John Blurton & Co." That is essentially different from the real name of the firm. With respect to the other part of the case, if necessary, I

(a) 9 M. & W. 284.

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should be disposed to say that the directors have legitimately followed the authority given by the deed of settlement. That empowers them to issue bills of exchange to any amount, and promissory notes for an amount not less than eight rupees, and not exceeding a thousand rupees. The question is, what is the meaning of the word "bill" in the deed of settlement, coupled with the word "issue"—an expression which cannot, in a strict sense, be applied to bills of exchange, since they require a third party to draw them. It seems to me that the intention was, that this company should follow the same rules as other banking companies with respect to the issuing of bank post bills. In construing the deed of settlement, the whole must be looked at in order to ascertain the meaning of the parties. Then if it was competent for this company to do all branches of business usually transacted by bankers in Calcutta, and if it was usual in the conduct of banking business to issue bank post bills, the company is bound, as respects the public at large, by the act of those persons to whom they have entrusted the management of their business.

PLATT, B.—I am also of opinion that the rule ought to be discharged. It seems to me unnecessary to consider whether the general law as to partnership firms applies to this case, because the parties are bound by the language of the deed of settlement. That empowers two directors to issue promissory notes payable to bearer, with certain limits, and also bills of exchange, without any restriction. One objection is, that the directors had no power to issue these instruments called bank post bills. The word "bill" is, perhaps, the most in general use of any word in the English language; but the law has given a character to the instrument called a bill of exchange, and supposing that the power of the directors is limited by the language of this deed, I think that it authorised them to issue these instruments. The definition of a "bank bill" in Webster's dic-

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tionary shews that these instruments, though in one sense promissory notes, are nevertheless bills of exchange. If I could find any difference between the obligation arising from a bill of exchange and one of these instruments, I could then understand why a limitation should be imposed on issuing them, but I find none. It seems to me that these instruments are bills of exchange within the meaning of the first clause of the deed of settlement; and further, that the directors were empowered to issue them, inasmuch as they were authorised to transact all branches of business usually transacted by bankers at Calcutta, and there was evidence that it was in the usual course of banking business to issue bank post bills. Then with respect to their form: the words "we promise to pay *on account* of the proprietors of the Union Bank" must either mean "we bind them to pay," or "we will pay to them." It is clearly not an engagement to pay to them. Then the words "on account" must be understood as equivalent to "for." If the words had been, "we promise on account of the proprietors of the Union Bank to pay," there could have been no doubt, and the circumstance of the words "on account" being placed after the words "to pay," in my opinion, makes no difference. I therefore think that the plaintiff is entitled to recover.

MARTIN, B.—I am also of opinion that none of the objections ought to prevail. With respect to the first, according to my view of the case, the defendant is liable, wholly irrespective of the deed of settlement. I think that the plaintiff is entitled to recover, because the defendant was a partner in the bank by which these instruments were issued, and there was evidence that the issuing of instruments in this form was part of the ordinary business of bankers. Upon the evidence adduced, I think that the jury would have found that such was the usual and customary mode of doing banking business. Indeed, I cannot conceive a more convenient mode. A person deposits money in the hands of a banker, and receives a document of this kind, which he

may deal with as money, and which can be transmitted any where with great ease and safety, whereby he is enabled to make a payment at a distant place. These, then, being instruments of an ordinary and usual character in banking business, the defendant is liable upon them ; for, in my judgment, whenever the manager or managers, acting on behalf of a banking copartnership, issue an instrument or make a contract ordinary and usual in the business of bankers, it is binding on the partners, whether it be an ordinary partnership or a joint-stock bank, and any stipulation in the partnership deed restricting the liability of the partners is wholly inoperative as against third persons. That doctrine was laid down by Lord *Ellenborough*, C. J., in *Rex v. Dodd* (a), and by the Court of Common Pleas in *Smith v. The Hull Glass Company* (b). Indeed, it appears to me common sense, that, if a partnership is formed for carrying on any business, and certain persons have authority to deal on behalf of the partnership, they may conduct their dealings in the ordinary mode in which such business is carried on, and the public has no concern with the manner in which the partners may choose to stipulate amongst themselves in regard to it. I am therefore of opinion that, even if the issuing of these instruments had been expressly prohibited by the deed of settlement, the defendant would have been liable. But I concur in opinion that these are instruments which the directors might issue in pursuance of the terms of the deed. It is said, that the directors are authorised to issue bills but not promissory notes, and that these instruments are promissory notes. In one sense they may be; but I find it thus laid down in 2 Black. Com. p. 470 :—"What has been said of bills of exchange is applicable also to promissory notes that are indorsed over and negotiated from one hand to another, only, that in this case, as there is no drawee, there can be no pro-

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(a) 9 East, 527.

(b) 11 C. B. 897.

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test for non-acceptance, or rather, the law considers a promissory note in the light of a bill drawn by a man upon himself and accepted at the time of drawing." That was written a considerable time ago, and is in conformity with what my Brother *Platt* considers the true construction of these instruments. The second objection is, that the document does not profess to bind the company, but the directors only. But the writing certainly means what it expresses. It is headed "Union Bank Post Bill," which means a bill of the Union Bank, payable at a future day. Therefore, the persons who take it have a right to look to the Union Bank as the contracting party. The construction of the document itself leads to the same conclusion. It means that the two individuals authorised by the proprietors of the bank to issue that document, have issued it on their behalf; and it is a document which, on the face of it, purports to create a liability in the bank. Thirdly, it is objected that the instrument is not made in the true name of the partnership firm, and therefore not binding on the shareholders. The law on this subject is correctly laid down in *Byles on Bills*, p. 31, 5th ed., where it is said: "But the firm is not liable where the partner varies the style of the firm, unless there be some evidence of assent by the firm to the variation, or *unless the name used, though inaccurately, yet substantially describe the firm.*" Therefore, in this case, if the name, though inaccurately stated, substantially describes the firm, that is sufficient. Now, the words "proprietors of the Union Bank" designate a number of persons carrying on business under the name of the Union Bank. This is, in substance, "The Union Bank." I must confess that I am not satisfied with the decision in *Kirk v. Blurton* (a). I think that "John Blurton & Co." meant the firm of "John Blurton." Here, however, the bank is substantially described. For these reasons I am of opinion that the rule ought to be discharged.

Rule discharged.

(a) 9 M. & W. 284.

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THE ELECTRIC TELEGRAPH COMPANY, Appellants; and
THE OVERSEERS OF THE POOR OF THE TOWNSHIP OF
SALFORD, Respondents.

June 6.

BY consent and order of a Judge, under the 12 & 13 Vict. c. 45, the following case was stated for the opinion of this Court:

The appellants are assessed to a rate for the relief of the poor of the township of Salford, made on the 1st November, 1853, "*for and in respect of the telegraph wires, posts, and land in which the same are fixed.*" The appellants appealed against the rate, and duly gave notice of such appeal to the next quarter sessions, holden at Salford.

By "The Electric Telegraph Company's Act, 1846," the appellants were incorporated by the name of "The Electric Telegraph Company," for the purpose of working certain patent rights recited therein, for transmitting messages between distant places by means of electric currents transmitted through metallic circuits; and it was thereby, amongst other things, enacted, that the "Companies Clauses Consolidation Act, 1845," and the "Lands Clauses Consolidation Act, 1845," should be incorporated with, and form part of, the said Act; but that nothing in the said incorporated Acts should authorise the appellants to purchase or take any lands without the consent of the owners and occupiers thereof; that the quantity of land to be held by the appellants at any one time should not exceed 100 acres.

The appellants accordingly constructed, fixed, and laid down along the lines, among others, of the London and North Western Railway Company, hereinafter called "The Railway Company," the posts, fastenings, wires, and apparatus for making and working their electric telegraph, on

The Electric Telegraph Company are liable to be rated for the relief of the poor in respect of their wires and posts placed along the line of a railway company; notwithstanding the latter may require their removal to a more convenient place.

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terms agreed upon between them and the railway company, and which varied from time to time, and have transmitted messages, for hire and reward, by means of their said electric telegraph between the different townships at or near to which they have their stations.

The railway company have not, at any time, constructed, fixed, or laid down along their line of railway any posts, wires, fastenings, or apparatus of their own for making or working an electric telegraph; but before and up to the year 1851, the railway company, by their own servants and for their own use, worked two of the wires belonging to the appellants, laid along the lines of railway of the said railway company, the appellants having always had other wires for their own use.

From some time in the year 1851, all the electric telegraphs on the lines of railway of the railway company, including the telegraphs within the respondents' township, have been worked by the appellants, and have been maintained, improved, and managed by them; and in consideration of the posts, wires, fastenings, and apparatus being fixed and maintained on the lands, buildings, and premises of the railway company, the appellants have, at their own expense, maintained and worked two of their wires on the said line of railway, together with all necessary and proper instruments and apparatus for working the same, for the exclusive use and benefit of the railway company. No rent, except as aforesaid, is paid by the appellants to the railway company for the land and buildings on which the posts and fastenings supporting the wires are placed, or for the appliances for carrying their telegraph upon or along the line, buildings, and works of the railway company, or for working the same telegraph. The two wires and the necessary instruments and apparatus so maintained and worked by and at the expense of the appellants, for the exclusive use and benefit of the railway company, are of very great value to the railway company in carrying on their

railway system. The wires so maintained and worked for the exclusive use of the railway company rest upon all the posts or standards in the respondents' township, in like manner as the rest of the wires of the appellants rest upon them. The railway company are rated in respect of their line of railway, buildings, and premises in the respondents' township. (The case set out the form of rate, which excepted such parts of the land as were in the occupation of The Electric Telegraph Company.)

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The standards or posts, as now placed in the railway or land of the railway company, are subject to removal, at the option of the railway company, to some unobjectionable situation on the line of railway, should their present working or position be found to interfere with the operations of the railway, or with any of the signals on the line, or with the constructions of any new works, or with any alterations in the line. The length of railway within the respondents' township having upon it the posts, wires, and works of the appellants, is 3293 yards, 1600 of which consist of an elevated brickwork viaduct, and the remaining 1693 yards is open cutting. The wires of the appellants cross several of the streets within the respondents' township on the brickwork viaduct.

The mode in which such telegraph is constructed in the respondents' township is as follows:—In the open parts of the railway, wooden posts or standards, of an average diameter of seven inches, are firmly fixed by being let into the ground of the railway, at intervals of about 30 yards apart, and from post to post continuous lines of telegraph wires are hung or suspended at the top; but along the raised viaduct the wires are collected together in a long wooden box or cover, which is affixed to the parapet of the viaduct, in one continuous length, by means of iron hold-fasts driven into the joints of the brickwork forming the parapet, with the exception of 188 yards at that end of the railway in the respondents' township which next adjoins Manchester, and

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on which portion the wires are placed in iron pipes, and laid down between the lines of rails placed upon the elevated viaduct.

The telegraph, so constructed as aforesaid, is placed entirely upon the property belonging to the railway company. Except as before stated, the appellants are not the owners or occupiers of any property or hereditaments whatsoever in the respondents' township, and they have no telegraphic station within that township.

The question for the opinion of the Court is,—Are the appellants liable to be rated? If the Court should be of opinion, that the appellants are not liable to be rated, then the rate is to be amended by striking out of it so much thereof as affects the appellants; but if the Court should be of a contrary opinion, then the rate is to be affirmed, subject to the amount of the assessment being determined by the court of quarter sessions at Salford.

Hugh Hill (with whom was *Monk* and *Leaming*) appeared for the respondents; but the Court called on

Sir *F. Kelly* (with whom was *A. Mills*), for the appellants.—The appellants are not rateable in respect of the land in which the posts are fixed. They are not the *occupiers* of the land within the meaning of the 43 Eliz. c. 2, s. 1. No one is rateable in respect of the occupation of land, unless he has the exclusive occupation. Here, the land is vested solely in the railway company, and the appellants have a mere liberty of fixing their posts in it. [*Martin, B.*—In *Rex v. The Chelsea Waterworks Company*(a), the company was held to be rateable for the occupation of land below the surface of the soil by their pipes, though another person was rated for the herbage. In *Burn's Justice*, tit. "Poor," p. 190, it is said, "Land hath,

(a) 5 B. & Ad. 156.

in its legal significations, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad cælum*, is the maxim of the law, upwards; and downwards, whatever is in a direct line between the surface of any land and the centre of the earth, belongs to the owner of the surface. The word '*land*' includes not only the face of the earth, but everything under it or over it (a)."] The right of the appellants to fix these posts in the land of the railway company is in the nature of an easement, with power to the company to substitute another place. The appellants have not such an occupation as would enable them to maintain ejectment. It is like the case of a direction post fixed in land by permission of the owner, who nevertheless remains in the exclusive possession of the land. Where the owner of a ferry secured his boats at the landing-place by means of a post fixed in the highway, it was held, that that did not make him the occupier of the highway, nor give him any exclusive possession of it: *Williams v. Jones* (b). [*Alderson*, B.—In that case, the owner of the ferry did not occupy the posts when he did not use them. Here there is a continual occupation. The appellants do not the less occupy because the company may remove the posts to another place.] A company authorised by Act of Parliament to make a river navigable, are not rateable as occupiers of the land covered with water, but have a mere easement in it: *Rex v. The Mersey and Irwell Navigation Company* (c). [*Martin*, B.—The distinction between an easement and an interest in the soil is pointed out in *Wood v. Leadbitter* (d).] The liability does not depend on the use made of the soil, but upon whether, in point of law, there is an occupation of it. Thus a person using a stall in a market is rateable for the stallage tolls, but not for the tolls paid in respect of goods sold in the

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(a) 2 Bla. Com. 18.

(b) 12 East, 346.

(c) 9 B. & C. 95.

(d) 13 M. & W. 838.

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stall: *Roberts v. The Overseers of Aylesbury* (a). Here the permission to use a portion of the soil for fixing the posts passed no interest in the soil.

POLLOCK, C. B.—The question is, whether the appellants are liable to be rated, and I am of opinion that they are. It seems to be conceded, that if the wires of the telegraph passed under ground, the company would be liable; and, in that case, it is not suggested that any difficulty would arise from the fact, that they are subject to removal to some other place. Again, suppose the wires passed under water, would not the company be liable? Then they are liable if the wires pass through the air, instead of land or water. The passage which my Brother *Martin* cited from Burn's Justice, shews that there is no distinction between the occupying land, by passing through a fixed point of space in the air to another fixed point, or by passing in the same manner through land or water. Land extends upwards as well as downwards, and whether the wires and posts are fixed above or below the surface, they occupy a portion of the land. The circumstance that they are subject to removal to another place, if found inconvenient, makes no difference. None of the cases cited in the argument present any analogy. In *Williams v. Jones* (b) all the King's subjects had a right to use the soil at the landing-place, and the use of it by the owner of the ferry for the purpose of securing his boats, did not give him any exclusive possession of it. So in the case of *Rex v. The Mersey and Irwell Navigation Company* (c), the deepening of the bed of the river, and making it subservient to the purposes of navigation, did not give the company the exclusive occupation of it; it still remained a public navigable river. In this case, the telegraph company has the exclusive occupation of the soil, when not interfered with by the railway

(a) 1 E. & B. 423.

(b) 12 East, 346.

(c) 9 B. & C. 95.

company; and it seems to me that it would make no difference if the posts were so heavy that they would remain without being fixed in the ground.

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ALDERSON, B.—I think that this point was decided in the year 1811, in the case of *Rex v. The Corporation of Bath (a)*. There the question was, whether the corporation was liable to be rated for reservoirs which, by means of aqueducts and pipes laid underground, supplied the city of Bath with water. It was contended, as here, that it was in the nature of an easement; that the corporation had no other use of the soil than merely to collect the water upon it before it was distributed, and that the reservoir was no further distinguishable from the pipes than as being larger. But the Court said, that the corporation were *occupiers* of the reservoirs, which they were empowered to make, and in which the water, which they were also authorised to collect, was kept; and that such reservoirs and the water kept therein were comprehended within the legal description of *land*. So here, the appellants are liable to be rated as occupiers of the land. There is no reasonable distinction between the electric fluid passing through pipes in the air, under water, or in the soil. All the surface upwards and downwards is *land*. If there is a profitable occupation by the posts and wires, whether under ground or in the air, it is an actual occupation of the surface. Suppose a building was erected in the air across a street, could there be a doubt that, though it was in the air as a house, the land was occupied. In the case of an upper floor of a set of chambers in Lincoln's-inn, is not the occupier rateable in respect of the occupation of the land? It is the same here; there is a profitable occupation of the land by the posts and wires, and the company are rateable in respect of it.

PLATT, B.—I am also of opinion that the company are

(a) 14 East, 609.

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rateable. This is different from an easement, as, for instance, where a person who has a right to cross a wet meadow, lays down stones to step on; for in such case, he does not occupy the space over which he passes, except during the time of his passage. Here there is a continuous occupation. It more nearly resembles the case of a tubular bridge, the posts representing the buttresses. It would make no difference if the posts were fixed in sockets, instead of being sunk in the ground. A person may let a field to be used in a particular way, either as a resting-place for horses and carriages, or as a standing-place for goods, and the use to which it is applied does not prevent the person who hires it from becoming tenant, though he occupies for a qualified purpose only. Here the company occupy by their posts, and also by having their wires suspended from post to post; and, although the railway company reserve to themselves the right to remove the posts and wires to a more convenient spot, still this company are occupiers of the soil along the line. It is a tenancy, subject to this qualification, that the company shall only occupy the soil by posts and wires at a particular place, and that they shall remove them to another place in the event of their being inconvenient. There is an exclusive occupation of the soil itself, and also of a portion of the space above it, along which the wires pass, and which, in contemplation of law, is part of the land.

MARTIN, B.—I am also of opinion that the company are rateable. The simple question is, whether the facts stated shew that the company has the exclusive occupation of what the law calls land, for, if so, according to the authorities, they are rateable. The 43 Eliz. c. 2, directs that the rate shall be made by taxation of "every occupier of lands," and by the construction put upon that enactment there must be an occupation of that which comes within the description of land, and a mere easement is not rateable. Is there, then,

in this case, such an occupation. Now, in Co. Litt. 4. a., Lord *Coke*, after giving a description of *land*, goes on to say, "And lastly, the earth has in law a great extent upwards, not only of water, as hath been said, but of air, and all other things, even up to heaven; for *cujus est solum, ejus est usque ad cælum*." Again, at 20. a., in describing a tenement, he says, that the word "includes not only all corporate inheritances, which are or may be holden, but also all inheritances issuing out of any of those inheritances, or concerning or annexed to, or exercisable within the same, though they lie not in tenure." That is the true distinction between land and tenements. Then, what are the facts? (His Lordship stated them.) That being so, the company have the exclusive occupation, by their posts and wires, of that which the law calls land. It is true, that the railway company have a right to direct the removal of the posts and wires to a more convenient place; but that only shews that this company are strictly tenants at will of the soil occupied by them. That is no objection to the rate. In the case of *Regina v. The East London Waterworks Company*(a), it was argued that the company were liable to have the position of their pipes and plugs altered; and Lord *Campbell*, C.J., says, "The company derive benefit from the operations of the Paving Commissioners; and though the situation of their pipes may be altered by the Commissioners, still, wherever their pipes are, the company are in the lawful occupation of the soil." That is directly in point. In my judgment, the company are, in law, exclusive occupiers of the land, and therefore liable to the rate.

Judgment for the respondents.

(a) 21 L. J., Mag. Cas., 174.

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May 23.

GURR v. SCUDDA.

The following agreement was held to be a contract relating to the sale of goods within the exemption in the Stamp Act, 55 Geo. 3, c. 184, Sched., Pt. I., tit. "Agreement:"—"I do agree to take all the manure at fourpence each horse, a week, for forty-five horses by the year, and to keep it cleared away every week; and likewise to let the few gardeners have a few loads at the same price, and serve them; and to let me have during year sixty loads of straw, at 1*l.* 9*s.* per load: begun the year 23rd of July, 1853, and ends 23rd of July, 1855."

ASSUMPSIT for the non-performance by the defendant of an agreement relating to the sale of manure.

Plea: Non assumpsit.—Upon which issue was joined.

At the trial, before *Pollock*, C. B., at the London Sittings after last Hilary Term, the plaintiff's counsel tendered in evidence the following unstamped document, which was written in two parts, respectively signed by the plaintiff and defendant:—

"Agreement between Mr. Wm. Gurr and Mr. Scudda.—I dou (a) aggree to take all the mannure at four pence each horse, a week, for 45 horses by the year; and to keep it cleard away every week; and likewise to let the few Gardners have a few loads at the same price, and serve them; and to let me have during the year 60 loads of straw at 1*l.* 9*s.* pr. load: began the year 23 July 1853 and ends 23 July 1855.

WM. GURR."

The officer of the Court called the attention of the learned Judge to the fact of there being no stamp affixed to the document (b). The plaintiff's counsel submitted that a stamp was not necessary, since this was a contract for the sale of goods, wares, and merchandise, within the exemption of the 55 Geo. 3, c. 184, sched. Pt. I. tit. "Agreement," and on that ground objected to pay the stamp duty and penalties; whereupon the learned Judge nonsuited the plaintiff.

Hawkins, in last Easter Term, obtained a rule nisi to set aside the nonsuit and for a new trial, on the ground that no stamp was necessary; against which

(a) Sic passim.

(b) See 17 & 18 Vict. c. 125, s. 28.

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Jacobs now shewed cause.—This is not an agreement “for or relating to the sale of goods, wares, or merchandise” within the exemption in the Stamp Act. The only agreements within that exemption are such as relate to goods in esse. With respect to *executory* agreements, the decisions under the 17th section of the Statute of Frauds afford some analogy; and this is not a contract which, before the 9 Geo. 4, c. 14, s. 7, would have required a note in writing: *Towers v. Osborne* (a), *Cobbold v. Caston* (b), *Boydell v. Drummond* (c). [*Martin, B.*—*Pinner v. Arnold* (d) and *The West Middlesex Waterworks v. Suwerkropp* (e) shew, that a contract for the sale of goods which are to be made is a contract “relating to the sale of goods” within the exemption in the Stamp Act.] In the cases of *Wilks v. Atkinson* (f), *De Fries v. Littlewood* (g), *Hughes v. Breeds* (h), and *Garbutt v. Watson* (i), the goods existed, though something remained to be done to them; here the subject matter of the sale had no existence at the time of the contract. It is a mere agreement that the defendant shall be at liberty to take from the plaintiff’s yard, every week, all the manure which he may find there. [*Martin, B.*—In *Shep. Touch. tit. “Bargain and Sale,”* it is said, “This word doth signify the transferring of the property of a thing from one to another upon valuable consideration.”] This is a mere agreement for the future supply of goods.—He also referred to *Cooper v. Elston* (k) and *Robinson v. Macdonnell* (l).

Hawkins appeared in support of the rule, but was not called upon to argue.

POLLOCK, C. B.—The rule must be absolute. If there is

(a) 1 Str. 506.

(b) 1 Bing. 399.

(c) 11 East, 142.

(d) 2 C. M. & R. 613.

(e) Moo. & M. 408.

(f) 6 Taunt. 11.

(g) 9 Jur. 988.

(h) 2 C. & P. 159.

(i) 5 B. & Ald. 613.

(k) 7 T. R. 14.

(l) 5 M. & Sel. 228.

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any doubt as to the meaning of the Stamp Act, it ought to be construed in favour of the subject, because a tax cannot be imposed without clear and express words for that purpose. Mr. *Jacobs* argued, that this is not a contract for the sale of goods, but an agreement that the defendant shall have the privilege of coming to the plaintiff's yard, and carrying away the manure, from week to week; and certainly, in the first instance, I concurred in that view. But there are cases which go the full length of deciding that a contract of this description is within the exemption. Thus, where the plaintiff engaged to quarry a certain quantity of stone to complete a wall (a), that agreement was held not to require a stamp, for the stones when cut would be goods, and the defendant had no interest in the land. There are other cases to the same effect; but it is sufficient to say that we ought to read the language of the Act most beneficially for the subject. If this agreement does not relate to the sale of goods, to what does it relate? Manure is purchased, the price is fixed, and the circumstance that part of the payment is to be made in straw does not affect the matter. I think that we may fairly read the exemption as including any agreement for the sale of goods whether present or future, and any agreement which would ultimately relate to the sale of goods.

ALDERSON, B.—I am of the same opinion. This is clearly a contract relating to the sale of goods. In the case of the quarry, the thing sold is not in the shape of goods: there is a quarry, and a person comes and cuts it. So here, the defendant comes when the thing sold is goods and takes it away. The thing when it is to be delivered by the one and received by the other, is in the shape of goods; then there is a contract for the sale of goods.

PLATT, B.—I am of the same opinion. In the agree-

(a) *Hughes v. Budd*, 8 Dowl. P. C. 478.

ment the pronouns "I" and "me" designate different persons. The one says, "I agree to take all the manure;" and the other, you are "to let me have," that is, "I will buy of you sixty loads of straw." I do not feel the slightest doubt that the agreement relates to the sale of goods. If the question had depended on the earlier decisions, I should have felt myself bound by them; but the cases of *Pinner v. Arnold* (a) and *The West Middlesex Waterworks v. Suwerkropp* (b) have got rid of all distinction as to the sale of goods *to be made*. If this agreement does not relate to the sale of goods, it is difficult to see to what it does relate.

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MARTIN, B.—The question is, whether this agreement is a "memorandum made for, or relating to, the sale of goods, wares, or merchandise;" and in my opinion there is no doubt that it is. It is a contract for the sale of manure at 4*d.* per horse, instead of selling it by ton. Reference has been made to various decisions under the Statute of Frauds; and certainly great efforts were formerly made to take cases out of the 17th section of that Act. These cases remained the law until it was amended by the 9 Geo. 4, c. 14, s. 7. According to the present law, however, if the result of the agreement be that the seller transfers the article *as goods* to the buyer, it is utterly immaterial whether the goods were existing at the time of the agreement or not, and the case falls within the exemption in the Stamp Act.

Rule absolute.

(a) 2 C. M. & R. 613.

(b) Moo. & M. 408.

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June 6.

DENDY v. HENDERSON.

By agreement between the plaintiff, a solicitor, and the defendant, after reciting that the plaintiff, being manager of certain estates at T., and finding it expedient to establish an office there for the transaction of law and other business, had proposed to appoint the defendant as resident clerk there—it was agreed, that the defendant should reside at T.; and that, in consideration of his services, the plaintiff should pay him a certain salary; and that either party might determine the agreement by

a certain notice; and that the defendant would not, for the space of twenty-one years, notwithstanding the decease of the plaintiff, reside in the parish of T., or within twenty-one miles thereof, or carry on therein or within the distance aforesaid, during the period of twenty-one years, any business of the description of that carried on under the agreement:—*Held*, per *Pollock*, C. B., *Alderson*, B., and *Platt*, B., that the restriction was not unreasonable and was good in law; per *Martin*, B., that the agreement was valid, for if the restriction as to residence was void, that as to not carrying on business was good.

A declaration on the above agreement alleged as a breach, that, after its determination, the defendant resided in the parish of T., and during the said period of twenty-one years carried on business in the said parish of the description of that carried on under the agreement.—Plea to first breach: that, although the defendant resided in the parish of T., yet he did not so reside for the purpose or with the intention of carrying on business of the description of that carried on under the agreement:—*Held*, that, whether the allegation in the declaration was to be read as one or two distinct breaches, the plea was bad.

THE declaration set out in terms an agreement in writing, the material parts of which are as follow:—An agreement made the 8th day of November, 1851, between S. Dendy (the plaintiff) of &c., solicitor, of the one part, and T. Henderson (the defendant) of &c., clerk, of the other part: Whereas the said S. Dendy, being the solicitor for and general manager of the Torre Abbey, St. Mary Church, and Babbiscombe estates, situate at Torquay, in the parishes of Tormoham and St. Mary Church, in the county of Devon, and having occasion for the services of a managing clerk to reside at Torquay, finding it expedient to establish an office there for the transaction of law and other business, hath proposed to appoint the said T. Henderson as resident clerk there, upon his entering into the agreement on his part hereinafter contained. Now it is agreed by and between the two parties hereto in manner following, (that is to say), that the said T. Henderson shall continually reside, except as otherwise directed by the said S. Dendy, at Torquay, and to have the use of three rooms in the house where such office shall be kept; that in consideration of the services to be performed by the said T. Henderson for and

on behalf of the said S. Dendy, under his direction, and so long as the said T. Henderson shall diligently and properly perform the same (subject to the proviso for determining the agreement hereinafter contained), the said F. Dendy for himself, his executors, administrators, and assigns, agrees to make the payment to the said T. Henderson hereinafter mentioned, (that is to say,) that the said T. Henderson shall be paid a salary of 65*l.* per annum, payable to him weekly; that the said T. Henderson shall exclusively devote his time and attention to the interest of the said S. Dendy, and shall not make use of his own name in any business matter, or as agent, except as agent for and in the name of the said S. Dendy, his executors, administrators, and assigns, and shall not take or accept any other situation, or transact any other business whatsoever on his own account, or for his own profit, or on account or for the profit of any other person or persons than the said S. Dendy, his executors, &c., except with the consent in writing of the said S. Dendy, his executors, &c. That the said T. Henderson shall be at liberty to determine this agreement on giving six calendar months notice in writing to the said S. Dendy, his executors, &c.; and that the said S. Dendy, his executors, &c., shall be at liberty to determine this agreement on one calendar month's notice to the said T. Henderson; but in case of any such determination by either party as last aforesaid, the said T. Henderson shall not, nor will, unless with and during the consent of the said S. Dendy, (such consent to be revocable at any time) for the space of twenty-one years from the expiration of such notice, and notwithstanding the decease of the said S. Dendy previous to or during the period aforesaid, reside in the parish of Tormoham, or of St. Mary Church, or within twenty-one miles thereof, or transact or carry on therein or within the distance aforesaid, either for himself or any other person or persons whomsoever, or in partnership or in connexion with any other person or persons whomsoever, during the period

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of twenty-one years, any business of the nature or description of the business that may be carried on under this agreement, or may be intended so to be, under a penalty of 2000*l.* to be recovered as liquidated damages. That this agreement shall not determine on the decease of the said S. Dendy, unless such notice to that effect in writing as hereinbefore is mentioned shall have previously been given by either party; and that the word assigns shall be taken to include the appointees or nominees of the said S. Dendy to the benefit of this agreement, and also any person or persons who may be or become at any time hereafter the surviving partner or partners in any firm whereof the said S. Dendy may have expressed, or shall express any intention, or proposal, or wish to enter into partnership.—Averments: that, according to the terms of the said agreement, the defendant became and was the resident clerk of the plaintiff and so continued until the said agreement was determined as hereinafter mentioned: that afterwards, and on the 15th day of August, 1854, and whilst the defendant continued such resident clerk as aforesaid, the plaintiff determined the said agreement, to wit, by giving to the defendant one calendar month's notice in writing in that behalf, according to the terms of the said agreement; and although such notice expired, to wit, on the 15th day of September, 1854, and twenty-one years from such expiration hath not elapsed, and although the plaintiff hath in all things performed his part of the said agreement and all conditions precedent: Yet the defendant hath, without the consent and against the will of the plaintiff, after the expiration of the said notice, to wit, continually from the time of such expiration hitherto resided in the said parish of Tormoham and also within twenty-one miles therefrom; and hath during the period aforesaid transacted and carried on in the said parish of Tormoham and in the said parish of Mary Church, and also within the distance of twenty-one miles thereof respectively, for himself and certain other persons, and in connection

with certain other persons, business of the nature and description of the business so to be carried on under the said agreement: And the plaintiff, by virtue of the said agreement, claims 2000*l*.

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Plea.—To first breach, that although the defendant hath, since the expiration of the said notice, resided in the parish of Tormoham and within twenty-one miles thereof; yet he hath not so resided for the purpose or with the intention of carrying on business of the nature or description of the business to be carried on under the said agreement.

Demurrer and joinder therein.

Sir *F. Thesiger*, in support of the demurrer.—First, the plea is bad. The agreement is, that the defendant will not reside or carry on the particular business within the prohibited distance. Those are distinct stipulations. The first breach alleges that the defendant did reside within that distance; and it is no answer to say that the defendant did not reside for the purpose of carrying on the particular business. There is an absolute agreement not to reside, and it is immaterial what was the defendant's motive for so doing.—Secondly, the declaration is good. There is nothing contrary to public policy in an agreement, founded on a good consideration, not to reside for a certain period in a particular place or district. In a deed of separation between husband and wife, such a stipulation would be valid. All the cases relate to agreements in restraint of trade; but if a person may restrain himself from carrying on a particular trade within certain limits, there seems no reason why he may not lawfully bind himself not to *reside* within these limits. It is no objection that the restraint extends beyond the life of the plaintiff. In *Hitchcock v. Coker* (*a*) the defendant, who had been in the plaintiff's service as an assistant, agreed not to carry on the business of a druggist

(a) 6 Ad. & E. 438.

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in a certain town or within three miles thereof; and it was held in the Exchequer Chamber, that as there was a legal consideration for the contract, the circumstance that the restraint was not limited to the life of the plaintiff, or to the time during which he should carry on business, did not render it unreasonable or oppressive. Again, in *Bunn v. Guy (a)*, a contract by an attorney, for a valuable consideration, to relinquish his business and recommend his clients to two other attorneys, and that he would not, after a certain time, practise within certain limits as an attorney, was held good in law, though the restriction was indefinite. [*Alderson, B.*—The rule was correctly laid down in *Hitchcock v. Coker (b)*, where *Tindal, C. J.*, in delivering the judgment of the Exchequer Chamber, says, "We agree in the general principle adopted by the Court, that where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void." Now, in this case, would not the agreement prevent the defendant from residing within the particular limit, even though he became a clergyman, or a physician, or an officer in the army? *Platt, B.*—Suppose the Bishop of Exeter appointed him minister of the parish of Tormoham?] If the restriction is founded on an adequate consideration and is not of itself unreasonable, it is valid: *Mallan v. May (c)*. In *Tallis v. Tallis (d)* a covenant by the defendant restricting him from carrying on the business of a canvassing publisher either in London or within 150 miles from the General Post-office, or in Liverpool or Manchester, was held not to be unreasonable; and a plea that there were numerous works which the plaintiff did not publish, and had no in-

(a) 4 East, 190.

(b) 6 Ad. & E. 454.

(c) 11 M. & W. 653.

(d) 1 E. & B. 391.

tention of publishing, and that many such might be published with advantage to the public by defendant and without injury to the plaintiff, was held bad. Lord *Campbell*, C. J., in delivering the judgment of the Court, says, "Unless the defendant made it plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion, or that the public interest would be sacrificed if the defendant's intended publications are excluded, according to the general rule before referred to, we ought not to hold the contract void." So here, the defendant ought clearly to establish that the restriction is greater than the plaintiff's interest requires, or that it is injurious to the public.

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J. A. Russell contra.—The true test is, whether, looking at the facts disclosed on the record, the restriction sought to be imposed is beyond what the plaintiff's interest requires. Now, the object of the agreement was to protect the plaintiff with reference to the business intended to be carried on under it; but the effect of the agreement is to restrain the defendant from carrying on any business whatever within the prescribed limits. There is an absolute restriction against residence within these limits, and if the defendant cannot reside he cannot carry on *any* business there. That is an unreasonable and oppressive restriction. [*Alderson*, B.—Is it clear that the protection of the plaintiff does not require that the defendant should not reside within the prescribed limits? The defendant must perform his agreement unless he can clearly establish that the restraint is unreasonable. *Martin*, B.—I never could understand how the question of reasonableness was one for the Court to decide, but it was so laid down by Lord *Macclesfield* in *Mitchel v. Reynolds* (a).] Restraints of this description may be divided into three classes: first, restraints on the

(a) 1 P. Wms. 181.

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sale of a good-will of a business; secondly, on a dissolution of partnership; and thirdly, between master and servant. The two former have received a liberal protection; but with respect to the latter, there is no case in which a restriction so large as the present has been upheld. But assuming that the agreement is good in law, the plea affords an answer to the first breach, for it shows that the defendant did not reside for any purpose connected with the agreement.—He also referred to *Pilkington v. Scott* (a).

Sir *F. Thesiger* in reply.—If the agreement be thus read—that the defendant will not reside and carry on business within the prescribed limits, the plea is bad, because it does not answer the breach which contains the two allegations, viz., the residing and carrying on business; but if the stipulations are distinct, viz., that the defendant will not reside *or* carry on business, then it is admitted by the plea that he did reside, and the purpose for which he did so affords no justification. Then with respect to the declaration: assuming that there is an absolute prohibition against all residence within the prohibited space or distance, it being apparent on the face of the agreement what was the object of that prohibition, and it being founded on a good consideration, the Court cannot say that it is unreasonable.

POLLOCK, C. B.—I am of opinion that the declaration is good and the plea bad. If the agreement be read according to its ordinary language, then there is an absolute undertaking by the defendant not to reside within the particular limit; and the plea admits that he did so reside. But if the agreement is to be read as containing but one stipulation, viz., that the defendant will not reside *and* carry on business, then the plea affords no answer to it. So that, *quæcunque viâ datâ* the declaration is good and plea bad.

(a) 15 M. & W. 657.

ALDERSON, B.—In order to raise any valid defence, the defendant must traverse the breach, in terms as alleged in the declaration. It may be that it requires the qualification stated in the plea; but if it does, the defendant cannot plead to it, for he cannot deny that he resided within the prohibited limit.

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PLATT, B.—I am of the same opinion. If the agreement ought to be read as if the word “or” were “and,” the plea is clearly bad, and the declaration good. But if the agreement is to be read as containing two propositions, in the alternative, viz., that the defendant will not reside *or* carry on business, I nevertheless think that the declaration is good, because the restriction as to residing within the particular distance seems to me a reasonable restriction, in order to protect the other party. Therefore, reading the declaration in either way, it is good, and the plea bad.

MARTIN, B.—I am of the same opinion. The plea is clearly bad, and the real question turns on the declaration. Now, if any portion of the contract is valid, there is a good cause of action. The defendant agrees not to reside within a certain district, or carry on therein a particular business. If that agreement can be read so as to leave a portion good, the declaration may be supported. It seems to me that it may be read as prohibiting the defendant from carrying on, within the particular district, business of the description mentioned in the agreement; and the declaration contains a breach alleging that he did so. Therefore, assuming that the other part of the agreement is bad, that part is valid; and consequently there is a good cause of action in respect of it.

Judgment for the plaintiff.

1855.

June 2.

GEORGE v. SOMERS.

A debtor, who has obtained his discharge under the Insolvent Debtors Act, 1 & 2 Vict. c. 110, s. 75, is still liable, at the discretion of the judge of a county court, to be committed to prison, under the 99th section of the 9 & 10 Vict. c. 95, for disobedience of an order made upon a judgment summons under the 98th section, obtained after such discharge.

IN this case a plaint had been levied in the county court of Kent, and on the 7th of March judgment was given against the defendant, and an order was made for immediate payment, upon which execution issued. On the 2nd of April the defendant was arrested at the suit of another creditor. On the 3rd he petitioned the Insolvent Debtors Court, and on the 28th he obtained his discharge under the Insolvent Debtors Act, 1 & 2 Vict. c. 110, s. 75, the judgment debt being duly inserted in his schedule. On the 10th of May the defendant was brought up before the judge of the county court upon a judgment summons, issued under the 98th section of the 9 & 10 Vict. c. 95, when the defendant relied upon his discharge by the Insolvent Debtors Court; but the judge of the county court committed him to prison for forty days, and upon a subsequent application for his discharge refused to grant it.

G. Francis now moved for a writ of habeas corpus for the discharge of the defendant out of custody (a).—The prisoner is entitled to his liberty, on the ground that he had obtained his discharge in the Insolvent Debtors Court in respect of this judgment. Now, the 98th section of the 9 & 10 Vict.

(a) The learned counsel had applied to the Courts of Queen's Bench and Common Pleas for the discharge of the defendant; but those Courts had refused a rule: see *George v. Somers*, 16 C. B. 539. The following is from Mr. Blackburn's note of what occurred in the Queen's Bench: *George v. Somers*.—*Francis* mov-

ed for the discharge of the defendant in this case in Trin. Term, 1855 (May 24), before Lord Campbell, C. J., Coleridge, J., Erle, J., and Crompton, J.; but the Court refused the rule, referring to *Ex parte Christie*, 4 E. & B. 714, and saying that they were bound by *Abley v. Dale*, 11 C. B. 378.

c. 95, under which he was committed, enacts, that "it shall be lawful for any party who has obtained any *unsatisfied* judgment or order in any court held by virtue of this Act," for the payment of any debt, to summon the debtor to appear in the county court, to be examined. And by the 99th section the Judge is empowered, under certain circumstances therein mentioned, to commit the debtor to prison for forty days. The judgment in respect of which the defendant has obtained his discharge in the Insolvent Debtors Court, cannot be considered as an *unsatisfied* judgment within the meaning of the 98th section. The Court of Queen's Bench refused to interfere, on the ground that they felt themselves bound by the decision of the Court of Common Pleas in *Abley v. Dale* (a); but the authority of that case seems somewhat shaken by the more recent decision of the same Court in *Ex parte Dakins* (b). [Pollock, C. B.—In that case the defendant was held not liable to be arrested, on the ground of personal privilege. That is not an authority in point. *Martin*, B.—I agree that if the power of committal given to the Judge of the county court by the 99th section of the 9 & 10 Vict. c. 95, had reference only to the debtor's property which is taken by the Insolvent Debtors Court, the argument on the part of the defendant would hold good. But under that section a person is liable to be committed, although he may have no property whatever. The Insolvent Debtors Court deals with the property only, but the county court judge may commit a debtor for having obtained credit by false pretences, or fraud, or breach of trust. How, then, can the Insolvent Debtors Act operate on these matters?] Under the 76th and 77th sections of the 1 & 2 Vict. c. 110, the defendant has already been in peril of being imprisoned for these matters. [Pollock, C. B.—It is not stated that any opposition was made to his discharge in the Insolvent Debtors Court.

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(a) 11 C. B. 378.

(b) 16 C. B. 77.

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He is in the same situation as a person who has been taken before a magistrate for committal, and the charge has been dismissed. It is not suggested that the Insolvent Debtors Court took cognisance of those matters over which the county court has jurisdiction. *Martin, B.—Abley v. Dale* is directly opposed to this application; and, moreover, the defendant has already obtained the opinion of two of the superior Courts. He must bring an action, and take the case to a Court of error.] Lastly, the defendant is entitled to his discharge by the express language of the 90th section of the 1 & 2 Vict. c. 110, which enacts, that “no person who shall have become entitled to the benefit of this Act by any such adjudication as aforesaid, shall at any time thereafter be imprisoned by reason of the judgment so as aforesaid entered up against him or her, according to this Act, or for or by reason of any debt or sum of money, or costs, with respect to which such person shall have become so entitled, or for or by reason of any judgment, decree, or order for payment of the same; but that, upon every arrest or detainer in prison upon any such judgment so entered up as aforesaid, or for or by reason of any such debt or sum of money or costs, or judgment, decree, or order for payment of the same, it shall be lawful for any Judge of the Court from which any process shall have issued in respect thereof, and such Judge is hereby required, upon proof made to his satisfaction that the cause of such arrest or detainer is such as hereinbefore mentioned, to release such prisoner from custody, unless it shall appear to such Judge, upon inquiry, that such adjudication as aforesaid was made without due notice, where notice is by this Act required, being given to or acknowledged by the plaintiff on such process, or being by him dispensed with by the acceptance of a dividend under this Act or otherwise.”

POLLOCK, C. B.—I think there is no ground for a rule. The later Act, 9 & 10 Vict. c. 95, gives new powers to the

Judge of the county court, and, in fact, overrides the former. The defendant, therefore, is not entitled to his discharge.

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MARTIN, B.—I think also there ought to be no rule; but I do not entertain so strong an opinion upon the point as my Lord Chief Baron. I think that we are not at liberty to refuse to act upon the authority of *Abley v. Dale*; but if the question were to be brought before me as a member of a Court of error, I should feel myself at liberty to consider the correctness of that decision (a).

Rule refused.

(a) The other Judges were absent.

MORGAN v. FERNYHOUGH

June 11.

THIS was a rule calling on the defendant to shew cause why a side-bar rule, obtained by him for the costs of the day for not proceeding to trial, should not be set aside. The plaintiff, an attorney, had given notice of trial for the last Liverpool Assizes; but when the case was called on, the plaintiff's clerk, who was in attendance, did not either proceed with the cause or withdraw the record, and no one appeared on behalf of the defendant, and consequently the cause was struck out.

A defendant is not entitled to the costs of the day for not proceeding to trial in pursuance of notice, where no one appeared on his behalf when the cause was called on.

Milward shewed cause (June 9).—The defendant is entitled to the costs of the day, although he was not present when the cause was called on. And if he is entitled to the smallest sum in respect of such costs, this rule ought

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to be discharged. In *Allott v. Bearcroft* (a), where it was held that a defendant is entitled to move for judgment as in case of a nonsuit, although the cause on being called on for trial was struck out of the list in consequence of the absence of both parties, *Parke*, B., said, "The plaintiff has not proceeded to trial according to the course and practice of the Court, but has been guilty of default; and the defendant might either have instructed counsel to appear and have the plaintiff called, or he might, as he has done, apply to this Court for judgment as in case of a nonsuit. The affidavit, however, discloses a sufficient excuse to induce us to discharge the rule as a peremptory undertaking. If the defendant can shew by affidavit that any costs of the day have been incurred in consequence of the default, he ought to have them." [*Pollock*, C. B.—The dictum of a learned Judge upon a matter not before the Court, and not even alluded to by the counsel, is of no binding authority. In that case the costs of the day were not asked for.] It is sufficient if the defendant shews that the plaintiff has been guilty of a default in not proceeding to trial according to his notice. This appears from the language of the 69th rule of Hil. Term, 2 Will. 4; and the '99th sect. of the Common Law Procedure Act, 1852, enacts that "A rule for costs of the day for not proceeding to trial pursuant to notice, or not countermanding in sufficient time, may be drawn up on affidavit without notice." *Powell v. James* (b) is an authority that the affidavit need not shew that the defendant has actually incurred costs. *Newton v. Chaplin* (c), cited on moving for the rule, has no bearing on the question.

Brett, in support of the rule.—The plaintiff relies upon *Newton v. Chaplin* as a decision directly in his favour. It was there held that a plaintiff is not entitled to the

(a) 4 D. & L. 327.

(b) 12 M. & W. 100.

(c) 7 C. B. 774.

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costs of the day, unless he is present when the cause is called on. Here the plaintiff was represented by his clerk, who was in attendance at the time. If the defendant had been present, he might have asked for a nonsuit. The allowance of these costs is a matter purely within the discretion of the Court: *Pope v. Fleming* (a), *Sleeman v. The Copper Miners' Company* (b); and as the defendant has been guilty of a default, he is not entitled to them.

Cur. adv. vult.

POLLOCK, C. B., now said.—The question in this case was, whether a defendant is entitled to the costs of the day for not proceeding to trial, where neither the plaintiff nor he attended in pursuance of the notice of trial, in consequence of which the cause was struck out. We are of opinion that under these circumstances the defendant is not entitled to such costs. Our judgment is founded upon this short ground, that it was entirely owing to the defendant's own fault that any useless costs were incurred, for if he had duly attended at the trial he might have nonsuited the plaintiff. But as he was not in attendance, both parties are in *pari delicto*; and the person who is equally in fault with the other side cannot ask the Court for costs which are the consequence of the neglect in which he concurred, and which was the cause of the mischief whereof he complains. A case was cited by the defendant's counsel of *Allott v. Bearcroft*, on which I remarked during the argument, that the question whether the party was entitled to costs was not then before the Court; and what the learned Judge is reported to have said, namely, that "if the defendant could shew that any costs of the day have been incurred in consequence of that default, he ought to have them," could

(a) 5 Exch. 249.

(b) 12 Jur. 184.

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hardly be taken to have reference to a case in which the default was one in which the defendant himself participated. The case of *Newton v. Chaplin* (a) was relied upon by the plaintiff's counsel, where the Court of Common Pleas appear to have thought a plaintiff not entitled to the costs of the day when he had not appeared. There a special jury had been obtained by the defendant, the jury were nominated and reduced, and the cause was called on; but, no special jury being in attendance, the cause was struck out. The plaintiff applied for a rule calling on the defendant to shew cause why he should not pay the costs of the day, imputing to him negligence in not insuring the attendance of the jury. The Court thought that the plaintiff might have summoned the jury himself; but, at all events, that he ought to have appeared at the trial. It is not necessary to make any further reference to the cases; for if the defendant had been present at the trial, the costs he now seeks to recover would not have been thrown away. The rule must, therefore, be absolute to discharge the side-bar rule.

Rule absolute.

(a) 7 C. B. 774.

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WRIGHT v. MORREY.

June 12.

UNTHANK moved for a rule calling on the plaintiff to shew cause why the defendant should not be at liberty to inspect and take a copy of an account book in the plaintiff's possession containing entries relating to certain accounts between the plaintiff and the defendant.—The affidavit of the defendant, in support of the motion, stated that, the defendant's wife having died on the morning of the 23rd of January last, the plaintiff on the same day informed him that some years previously he had lent the defendant's wife 200*l.*, and that that was the first intimation the defendant had received of the matter; that the plaintiff at the same time produced and shewed to the defendant an account book, stating it to be the book in which his accounts against the defendant were kept, and in which, as the defendant believed, a sum of 200*l.* was entered and charged against him; and that he, the defendant, was desirous of knowing whether the money was advanced before or after the defendant's marriage with his deceased wife. An application had been made to *Martin*, B., at chambers, but his Lordship refused to make an order.—If it should appear from the book that the money was advanced after coverture, the defendant has a good defence to the action. He is therefore desirous of inspecting the book to ascertain the date of the loan. [*Parke*, B.—The defendant is seeking by this application to pick a hole in the plaintiff's case. A bill of discovery would not lie in such a case.] The plaintiff is not bound to use the book, as he may prove his case by other evidence. [*Martin*, B.—If the book be evidence, it is the plaintiff's, and the defendant has no right to ask for the inspection of a document which is no part of his case].

The Court refused to grant an order for the inspection of a document upon an affidavit made by the defendant, which stated that the plaintiff's claim was for money lent to the defendant's wife, and that the first intimation which the defendant received of such claim was after the death of his wife, but on the day of her death, when the plaintiff shewed the defendant an account book, which the plaintiff stated contained accounts between himself and the defendant, and in which the defendant believed the sum claimed was charged against him, and that he was desirous of knowing whether the money was advanced before or after his marriage with his deceased wife.

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PER CURIAM (a).—The affidavit is not sufficient. There will be no rule.

Rule refused.

(a) *Pollock*, C. B., *Parke*, B., and *Martin*, B.

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MAY v. HAWKINS.

The affidavit in support of an application by a plaintiff for leave to deliver interrogatories to the defendant, under the 52nd section of the Common Law Procedure Act, 1854, must shew that he has a good cause of action upon the merits; and, therefore, in an action of ejectment by reason of the forfeiture of a lease by breach of a covenant to insure, an affidavit, which merely stated that the plaintiff believed that "there was a good cause of action for the breach of covenant

LUSH had obtained a rule calling on the defendant to shew cause why the plaintiff should not be at liberty to deliver to him the interrogatories in writing hereinafter mentioned, under the 17 & 18 Vict. c. 125, s. 51.—It was an action of ejectment brought by the plaintiff, as assignee of the reversion, against the defendant who was tenant in possession, upon the alleged forfeiture of the lease under which the premises were held, by reason of a breach of a general covenant to insure. The proposed interrogatories were as follows :—

"First.—Have you, or has any person on your behalf, and if so, from what and up to what period, paid the rent of 5*l.* 5*s.* per annum in respect of the premises for which this action is brought; and to whom and for whose use have you so paid the same, and have you the receipts for the same?

"Secondly.—Did you at any time or times, and when, effect any policy or policies of insurance upon the premises mentioned in the preceding interrogatories? If so, in what office or offices respectively, for what amount or amounts, what is the number of each of such policies, and how long was each of such policies kept on foot?

above mentioned," was held insufficient, inasmuch as by a waiver of the forfeiture the plaintiff's right to maintain ejectment would be gone.

"Thirdly.—Was there, any time between 1833 and the 16th of June, 1854, any subsisting policy or policies upon the said premises? If so, what is the number and date of such policy, or, if more than one, of each of such policies, in what office or offices, by whom and for what amount or amounts was each of them effected, and how long was each of them kept on foot?"

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The affidavit in support of the motion was a joint one made by the plaintiff and his attorney, which, after setting forth the facts, stated that in June, 1854, the defendant, in answer to inquiries and demands made by the plaintiff, informed him that the premises were insured in a certain insurance office, stating the amount and number of the policy; that the plaintiff thereupon ascertained that the insurance was effected on the 17th of June, 1854; and the plaintiff added his belief that no insurance whatever had been effected or was subsisting on the premises for some years up to that day, and that none would then have been effected but for his inquiries and demands. The plaintiff further deposed, that in consequence of the generality of the covenant to insure, he was advised that he should have great difficulty and incur great expense in proving, otherwise than from the defendant himself, the breach of that covenant; and further, that he verily believed that he should, (and his attorney deposed that he believed the plaintiff would), derive material benefit in this cause from the discovery sought by the interrogatories; and they both deposed that they believed that there was a good cause of action for the breach of covenant above mentioned.

The case had been before *Parke, B.*, at Chambers; but his Lordship refused to make an order, on the ground that the defendant was not bound to disclose that he had been guilty of an act which would amount to a forfeiture of his estate.

Watson (*Aspland* with him) shewed cause.—This appli-

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cation ought not to be granted, upon two grounds: first, it is a mere experiment, made with a view to ascertain whether the defendant has been guilty of a forfeiture; and secondly, the affidavit is insufficient, for it is not an affidavit of merits as required by the 52nd section of the Common Law Procedure Act, 1854. That section enacts, that "the application for such order shall be made upon an affidavit of the party proposing to interrogate, and his attorney or agent, &c., stating that the deponents or deponent believe or believes that the party proposing to interrogate, whether plaintiff or defendant, will derive material benefit in the cause from the discovery which he seeks, *that there is a good cause of action or defence upon the merits*; and if the application be made on the part of the defendant, that the discovery is not sought for the purpose of delay." The affidavit does not allege that the plaintiff believes that there is a good cause of action to support an action of ejectment. The forfeiture of the lease, by reason of the breach of covenant to insure, may have been waived so as to deprive the plaintiff of his right to maintain an ejectment.—He was then stopped by the Court.

Lush in support of the rule.—The 52nd section does not make it imperative upon the plaintiff to depose that he believes that there is a good cause of action *on the merits*. The latter words have reference only to the last antecedent, "defence," and make it incumbent on a *defendant* to allege that there is a "good defence on the merits." [*Parke*, B.—The plaintiff does not allege that there is a good cause to support this action, but only that there is a good cause of action for the breach of covenant. *Platt*, B.—The plaintiff relies upon a stringent remedy, and he must, therefore, be strictly correct in his proceedings.] The statute is framed upon the well-known practice of requiring an affidavit of merits from a defendant who is asking a favour. *Pollock*, C. B.—I think that a plaintiff is bound equally

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with a defendant to make an affidavit of merits. *Platt, B.*—I also think that he should depose that he believes he has a meritorious cause of action, as well as a defendant, who is bound to state that he believes he has a meritorious defence. *Parke, B.*—I do not dissent from that proposition. A plaintiff is bound to state that he has “a good cause of action.” Now, this affidavit is ambiguous; for the plaintiff may have a good cause of action for the breach of covenant by reason of the defendant not having insured; but the forfeiture may have been waived so as to deprive him of all right to maintain this action of ejectment. If the forfeiture had been waived by the acceptance of rent, or otherwise, the plaintiff could not be indicted for perjury upon this affidavit. The objection is a fine one, but must prevail.]

POLLOCK, C. B.—I think the objection to the affidavit is good, and that the rule must be discharged, with costs.

PARKE, B.—I am sorry that the case should be decided upon the minor point; for it is very much to be desired that the Court should be in a position to decide the principal one. I shall continue to pursue the principle I acted upon in this case at Chambers, by refusing to allow interrogatories which are framed with a view to deprive a man of his estate. I believe that this principle is always recognised in the Courts of Chancery, and I shall continue to act upon it until there is a decision to the contrary in the superior Courts.

PLATT, B., concurred.

MARTIN, B.—I take the same view of the matter as my brother *Parke*. I think it would be monstrous to allow this enactment to be used for the purpose of fishing out information in a matter of such a penal character as the present.

Rule discharged, with costs.

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June 7.

HODGES v. ANCRUM and Others.

Under the 18th section of the 17 & 18 Vict. c. 125, the right of the party who begins, to sum up the evidence at the trial, is confined to the case where the Judge holds that there is evidence to go to the jury: per *Pollock*, C. B., *Parke*, B., and *Martin*, B.; dissentiente *Platt*, B.

THIS was an action on a bill of exchange, against the defendants as acceptors. The defendant Ancrum allowed judgment to go by default, and the other defendants pleaded that they did not accept the bill; upon which issue was joined.

At the trial, before *Parke*, B., at the London Sittings in this term, it was objected on the part of the defendants, who had pleaded, that there was no evidence that the bill was accepted by their authority so as to bind them. The learned Judge, after hearing counsel on both sides, ruled that there was no evidence; but stated that he was of opinion that the point ought to be reserved for the consideration of the Court. The plaintiff's counsel, however, refused to be nonsuited, and claimed the right of summing up his case under the 18th section of the Common Law Procedure Act, 1854. The learned Judge, however, was of opinion, that as he had ruled that there was no case to go to the jury, the section relied upon did not apply, and he intimated that he should direct a verdict to be entered for the defendants. The plaintiff's counsel then consented to a nonsuit being entered, leave being reserved to him to move to set the nonsuit aside, and to enter a verdict for the plaintiff for the amount claimed, if the Court should be of opinion that there was evidence to go to the jury.

James now moved in pursuance of the leave reserved; but the Court were unanimously of opinion that there was no evidence to go to the jury. He then moved for a rule nisi for a new trial on the ground of misdirection.—The plaintiff's counsel was entitled to sum up his case to the jury under the 18th section of the 17 & 18 Vict. c. 125, which

enacts, that, "Upon the trial of any cause, the addresses to the jury shall be regulated as follows: The party who begins, or his counsel, shall be allowed, in the event of his opponent not announcing at the close of the case of the party who begins his intention to adduce evidence, to address the jury a second time at the close of such case, for the purpose of summing up the evidence; and the party on the other side, or his counsel, shall be allowed to open the case, and also to sum up the evidence (if any); and the right to reply shall be the same as at present." The judge has no power to interfere by withdrawing the case from the jury, and the plaintiff's counsel is entitled under this clause to address the jury at the close of his case. [*Martin*, B.—The clause says, that he shall be allowed to sum up "*the evidence*," which means in a case in which there is some evidence. If there is no evidence, it is the duty of the Judge to say so. *Pollock*, C. B.—Where the Judge rules that there is no evidence, it would be a mere idle ceremony to allow the party or his counsel to sum up. If the learned Judge is wrong in ruling that there is no evidence for the jury, the party who contends that there is has his remedy, either by tendering a bill of exceptions, or by moving the Court in banc for a new trial.] It is submitted, that the Judge has no right to interfere before the plaintiff's case is completed by the address to the jury. The address is as much a matter of right as the right to call a witness.

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POLLOCK, C. B.—I am of opinion that there ought to be no rule. Upon the first point we have already stated, that we are all of opinion that there was no evidence to go to the jury, and therefore upon that point there will be no rule. The learned counsel also moved for a new trial, on the ground that before he consented to the entry of a nonsuit in order to raise the first point, he protested against the entry of a verdict for the defendant by the direction of

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the learned Judge, without being first allowed to sum up the case to the jury. Now, the 18th section says this— [His Lordship stated it, and proceeded:] Reading this section in the ordinary way, and according to the just principles of construction with reference to the subject-matter, I am of opinion that it means, that the party who begins, or his counsel, shall be allowed, in the event of the occurrence of what is specified in the section, to address the jury by summing up the evidence; that is to say, in that case only where there is evidence to sum up, and where there is matter to be left to the jury upon which they are called upon to decide. An address to the jury, in a case where there is no evidence, could only have the effect of inciting them to take the matter into their own hands, and to decide it in opposition to the opinion of the learned Judge. No doubt, there ought to be an opportunity of discussing the question whether there is evidence to go to the jury. But though that is a matter which may be discussed in the presence of the jury, it is not their province to decide it. It is the duty of the Judge to decide that question. To hold otherwise would be to allow counsel to appeal from the Judge to the jury in a matter not for them, which would clearly be improper. Where the Judge is of opinion that there is no evidence for the jury, it is not the course for him to read his notes to the jury, telling them that he thinks that there is no evidence, and that he hopes that they concur in that view; but he tells them that there is no evidence, and he directs them in law to find a verdict for the defendant. If the Judge is wrong in such direction, the constitutional mode of correcting the error is either to tender a bill of exceptions or to move the Court in banc, and not to argue at the Judge through the jury. For these reasons I am of opinion that my Brother *Parke* acted correctly, and I am sorry that my Brother *Platt* entertains a different opinion upon the question.

PLATT, B.—The 18th section enacts, that at the close of the case of the party who begins, in the event of the opposite party not announcing his intention to adduce evidence, the party who begins, or his counsel, may address the jury “for the purpose of summing up the evidence.” Does it mean that the section shall apply only in the event of there being sufficient evidence in point of law to go to the jury? I think not. It seems to me, that, until the summing up of the plaintiff’s counsel is concluded, he has not made out his whole case. I do not anticipate that counsel will misuse such privilege by attempting to set the jury against the direction of the Judge. I think that a plaintiff’s counsel has the right, upon the Judge expressing his opinion on the evidence, to request the case to be put to the jury, subject to the direction of the Judge; for there are two things which it is the duty of the jury to observe—they are to adopt the law, and to decide upon the facts. I should be exceedingly anxious to resist the withdrawal of any fact from the jury. It might also turn out, that an impression taken up by a learned Judge before the summing up of counsel that there was no evidence, would be got rid of before the close of the address; for there is a candour brought by every Judge in this country to the consideration of every case, which assists him in his endeavours to do that which is just. I think, therefore, that the privilege which is given to the public by this enactment,—for it is not a privilege given to counsel only,—ought not to be invaded. By the term “evidence,” I understand all the evidence, documentary or otherwise, brought forward before the close of the plaintiff’s case; and I think, that as the counsel has the undoubted right to contend before the Judge that there is evidence to go to the jury, he has this further right given him by this enactment, to complete his case by addressing the jury upon it, subject at the same time to the direction of the Judge. We

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ought to be very slow indeed to interfere with an Act of Parliament which contains such clear words as this does, and to be careful how we introduce into the 18th section the words, "provided the Judge thinks there is sufficient evidence to go to the jury." In my opinion, the language of the concluding portion of the sentence does not assist the opposite argument. The words are, that "the party on the other side, or his counsel, shall be allowed to open the case, and also to sum up the evidence (*if any*)," for it is clear what is meant by the words, "the evidence (*if any*)."
 For these reasons I think that there ought to be a rule upon the latter point.

MARTIN, B.—I am sorry that any difference of opinion should exist among the members of the Court upon a point which is of considerable importance. The question has been much embarrassed by reference to the application for a nonsuit, which, in reality, has not much to do with it. It is the ordinary practice, at the end of the plaintiff's case, for the defendant's counsel, who contends that there is no evidence to go to the jury, to suggest that the plaintiff be nonsuited. It is the province of the Judge to decide the point, whether there be evidence, or not, for it is a matter of law; and if there be no evidence it is for him to decide it. But the Judge has no power to nonsuit a plaintiff: a nonsuit cannot take place without the plaintiff's consent, and it is entered because it is the preferable course for a plaintiff, who, upon obtaining additional evidence, may bring a second action. The form of the entry of a nonsuit is, that the plaintiff is called to hear the verdict delivered and does not come; but if the plaintiff does come a nonsuit cannot be entered, and the Judge must then direct a verdict for the defendant. The application, therefore, on the part of the defendant for a nonsuit is a mere form of words; the application is substantially made to the Judge, and for him to exercise his right as a Judge, and to stop the

case, on the ground that, assuming the plaintiff's evidence to be all true, he has nothing to support it. It is the duty of the Judge, under such circumstances, to tell the jury to find a verdict for the defendant, not in the exercise of their own judgment, but in obedience to his direction, acting in the exercise of his constitutional power. Now, in this case my Brother *Parke* thought that there was no evidence for the jury (and we all think that his opinion is correct upon this point), and he rightly, in my opinion, told the jury that they must find a verdict for the defendant. The Judge must assume the evidence to be true; and if there be any evidence in support of the plaintiff's case (whether such evidence, in the opinion of the Judge, be false or true is immaterial), the Judge is bound to submit it to the jury. When the Judge in the exercise of his judgment thinks there is a case for the jury, the 18th section gives to the plaintiff the right of a second address, for the purpose "of summing up the evidence," that is, for the purpose of satisfying the jury that his evidence is true and sufficient, and of inducing them to find a verdict for him. But if the Judge has already exercised his right by telling them that there is no evidence, they cannot do so. It seems to me clear, that it was not intended that the statute should give a second address in a case where the Judge has exercised his right, by deciding that there is no evidence. A contrary practice would, in effect, as the Lord Chief Baron truly observed, allow an appeal from the Judge to the jury on a matter which is his peculiar province, and upon which he has already exercised his constitutional power. I remember, upon first commencing practice at the bar, in a case before the late Lord Chief Justice *Tindal*, I was proceeding to address the jury upon the objection that there was no evidence in support of the plaintiff's case, his Lordship requested me to address my objection to him, and not to the jury; and he explained his reasons for such a course pretty much in the same manner as I have endeavoured to do on the present occasion.

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PARKE, B.—I concur in the opinions expressed by my Lord Chief Baron and my Brother *Martin*. I am sorry that any difference of opinion should exist, and if I thought that I should, upon consideration, be likely to alter my opinion, I should wish for some little time to consider the question. But the simple point is—and we have heard all the arguments necessary to enable us to determine that point—what is meant by there being sufficient evidence for the jury?—a question commonly raised by counsel when asking for a nonsuit. My Brother *Martin* has given a very clear explanation of the question, that it is where there is no evidence fit for the consideration of the jury. If there is no evidence, the plaintiff may be nonsuited if he pleases; if not, on the close of his evidence, the Judge must direct a verdict to be entered for the defendant. It is clear from the words of the Act, that the right of summing up is only given in a case where there is evidence for the consideration of the jury. The plaintiff's counsel no doubt has a right to explain his evidence to the Judge, and to point out that there is evidence for the jury, and that right was allowed and exercised in this case; but I am clearly of opinion that the statute was not intended to supersede the right of the Judge to tell the jury, that, in his opinion, the plaintiff has not established any case, and that therefore they must find a verdict for the defendant. This clause was only intended to give a right of addressing the jury upon a point when they have to decide it. If the Judge is wrong in deciding that there is no evidence, the plaintiff's remedy is either by a bill of exceptions, or by an application to the Court in banc. As to the first question, we are all of opinion that there was not a scintilla of evidence.

Rule refused.

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THIS was a rule calling on the defendant to shew cause why the Master should not review his taxation of the plaintiff's costs in this case.

It was an action by the plaintiff, as drawer, against the defendant, as acceptor, of a bill of exchange. The defendant pleaded that he did not accept the bill; and at the trial of the cause, at the last Stafford Assizes, the plaintiff, not being able to produce the bill, in order to account for its non-production, called two witnesses who were clerks to the plaintiff's attorney. These witnesses deposed that, during the progress of the suit, the plaintiff's attorney sent the bill to the London agents for the purpose of its being produced under a notice to admit; that it was afterwards inclosed in an envelope, and brought back to the plaintiff's office by one of the above-mentioned clerks, who laid it upon a desk in the office. The other clerk took it up, supposing that the envelope was empty, and threw it into the fire. Upon the testimony of these witnesses, secondary evidence of the bill was received, and the plaintiff obtained a verdict. On taxation, the Master, after consulting the other Masters, disallowed the costs of these witnesses.

At the trial of an action on a bill of exchange, to which the defendant pleaded that he did not accept the bill, in order to let in secondary evidence of the contents of the bill, two clerks of the plaintiff's attorney were called, who deposed, that, after action brought, an envelope containing the bill had been laid by one of them on a desk in the office of the plaintiff's attorney, and that the other clerk had by mistake, not supposing that the envelope contained anything, thrown it into the fire, by which it was destroyed. The plaintiff obtained a verdict. On the taxation of costs, the Master refused to allow the plaintiff, as against the defendant,

Pigott shewed cause.—The Master exercised a sound discretion in disallowing these costs, which were occasioned solely by the negligence of the plaintiff's attorney. The 23 Hen. 8, c. 5, s. 1, by which successful defendants obtained their costs, and which enacts that the costs are

the costs of these witnesses:—*Held*, per *Pollock*, C. B., and *Martin*, B., that the Master was right; *Alderson*, B., and *Platt*, B., contra.

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"to be assessed and taxed by the discretion of the Judge or Judges of the Court where the action is brought," contains the principle upon which the taxation of costs is founded. Now, the Master stands in the place of the Court, and this question is a matter for the Master's discretion; and, moreover, he has exercised it. As between attorney and client, the Court has no jurisdiction to entertain the question, whether an attorney is precluded from recovering remuneration for that which was occasioned either by his own negligence or that of his clerk. But as between party and party, the Court, and the Master as the representative of the Court, is the proper and the only tribunal for the decision of the question of negligence. [*Alderson*, B.—If these expenses are not to be allowed, the result will be, that secondary evidence will never be paid for by the defeated party.] This evidence became necessary solely through the negligence of the attorney's clerks, and the allowance of such costs will afford a premium for negligence. There is no direct authority upon the point. *Matchett v. Parkes* (a), which was cited upon the motion for the rule, is not an authority in the plaintiff's favour, the question there being between attorney and client; and therefore it was not properly one for the decision of the Court, but for a jury. If the attorney were to lose a brief which he had prepared for the plaintiff, he would not be entitled to charge the defendant for making a fresh one. If he were to find, on arriving at the assize town, that he had left an important document in London, he would not be entitled to be paid by the defendant for the expenses so incurred. [*Alderson*, B.—Those are all matters which arise in the course of the preparation of the trial, but the evidence here was necessary evidence in the cause.] It is difficult to see the distinction between the two classes of evidence, as both are incidental to the trial. Lastly, if this be matter for the discretion of the

Master, the question is settled by his having exercised his discretion.

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Phipson in support of the rule.—The Master has no jurisdiction to enter into the question of negligence. In taxing costs as between party and party, the only inquiry is, whether the item charged was necessarily incurred for the due prosecution of the suit. Now, this evidence was essential to the plaintiff's success. The attorney may recover this identical amount from his client, the plaintiff, for the jury may give him a verdict if they should be of opinion that the loss of the bill was occasioned by an unavoidable accident. If the attorney's house were burnt down and all his client's papers consumed, the Master could not, upon taxation of costs between party and party, go into the question whether the fire was occasioned by the negligence of the attorney or of his servants.

POLLOCK, C. B.—I am of opinion that the rule ought to be discharged. The case is distinguishable from that of a deed, or of any other document, which has been lost for a considerable period of time, and where all that is known of it is merely that it is lost. I think, that, if the night before a cause is coming on to be tried, the clerk of the plaintiff's attorney, who has the care of the papers, burns a bill of exchange, which is required as evidence in the cause, by lighting his pipe with the bill, such act of the attorney's clerk ought not to create any additional expense to the defendant, who, though the verdict be against him, may have righteously defended the action, in relying upon a point which made it a fit and proper cause to be tried. And I think that in such case it would not be just to make the defendant pay the expenses incurred by bringing a witness down to the assizes, to tell the story of his having destroyed the bill of exchange by his own negligent act. Here the bill was destroyed after the cause was in progress, and

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when that instrument had become a most important document, and consequently great care should have been taken of it; and I think that the plaintiff cannot cast upon the defendant the expenses arising out of the negligence either of the plaintiff himself, or of his attorney, or of the attorney's clerk, for the conduct of both of whom the plaintiff himself is responsible. Upon these grounds I am of opinion, that, in such a case as this, the Master is bound to go into the question whether the expenses were properly incurred in the course of the cause, and under such circumstances as to make the defendant responsible for them. Mr. *Phipson* says, that, notwithstanding the disallowance of these costs as between party and party, the attorney may bring an action against his client for the recovery of them. But he may not succeed in the action; and I do not see why we should extract these costs from the defendant's pocket, on the ground that the plaintiff's attorney may bring an action for them against his own client. If the question were now between attorney and client, I should say that the expense ought to fall upon the attorney himself, and that he could not recover for an expense occasioned by the avowed negligence of his clerk, for whose acts he is himself responsible. On this ground I think that these expenses could not be recovered as expenses in the cause. If the plaintiff had lost the cause instead of gaining it, and the plaintiff and his attorney had to settle the bill between them, and if the plaintiff could not have been called upon to pay these expenses, *à fortiori*, the defendant cannot be called upon to pay them to the plaintiff. I therefore think that the Master was bound to enter into the inquiry, and acted rightly in disallowing these costs.

ALDERSON, B.—I differ in opinion from my Lord Chief Baron. I think that this rule ought to be made absolute, on the principle that the Master had not the power, under the discretion entrusted to him, to try the question of ne-

gligence. By entrusting the Master with such a power, he would be constituted the sole judge of questions which ought to be decided by a jury and the Court. What is the true criterion for the allowance of costs? It is this: the plaintiff is entitled to such costs as were incurred by the proof of everything that was necessary to be given in evidence at the trial, to entitle him to recover from the defendant, who, by the hypothesis, was originally in the wrong, by unjustly refusing to pay that which he was by law bound to pay. The defendant was bound to pay all those expenses which, under the circumstances, were necessarily incurred to support the plaintiff's case. The loss of the bill by the plaintiff's attorney has nothing to do with the plaintiff's rights as against the defendant. The plaintiff is not to lose his right through his attorney's carelessness. The Judge and jury are bound to decide the case upon the evidence before them. Secondary evidence is given because primary evidence cannot be obtained; but if the question as to the way in which the primary evidence was lost,—whether it was destroyed by fire, or whether it was lost by being carelessly taken away from a desk,—is to be gone into before the Master, he would have the duty imposed upon him of trying all possible questions of negligence. The plaintiff was clearly entitled to give this evidence on the investigation of his cause at the proper time, and before persons competent and authorised to go into it; and I think that he ought not to have that right affected by the disallowance of expenses incurred in the production of that evidence which was necessary for his case. I therefore think that he ought to be paid for it.

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PLATT, B.—I am also of opinion that the rule ought to be absolute. These costs were necessarily incurred in support of the issue, and that being so, the question is, whether any other matter can be gone into before the Master on the taxation of costs. I do not agree as to the ap-

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plication of the suggested case of an attorney who arrives at the assizes without the documents necessary for the trial, and who therefore has to return to town for them. If the attorney were, on his journey to the assize town, to go out of the road or beyond the place, such extra expenses would not be allowed. But such a case has no application to the present, where the plaintiff's right to costs is founded on their necessity for his proof. Now, suppose that, instead of the attorney's clerk having made this mistake in burning the bill of exchange, the housemaid, whose duty it was to take care of the attorney's chambers and set things to rights, had placed the papers on a wrong shelf, so that this document could not be found on the day of the trial, the costs of the evidence to shew that the document was lost would be allowed. Suppose a document is destroyed in the attorney's house, which has been burnt down, would evidence be admissible before the Master to shew that the fire was occasioned by negligence, and that the attorney is responsible for it? It seems to me that that is not the proper way of trying the question of negligence. I am not sure that the attorney could not recover these expenses from his client, but that is a question for a jury. Is the Master to take upon himself the functions of the Judge, jury, and Court, because it is supposed—for it is not certain what the fact was—that the envelope, when thrown into the fire, contained the bill of exchange. The defendant, in improperly defending the action which the plaintiff brings to recover his debt, is bound to pay the costs to which he has necessarily put the plaintiff. I think the plaintiff is entitled to recover all such costs, and that the question between attorney and client has nothing to do with the question between party and party. The case should be put upon the same footing as if the client had placed a sum of money in his attorney's hands prior to the suit, for the purpose of carrying it on, in which case the plaintiff might say that he had necessarily expended this particular

sum in carrying on his suit, and that he could not have recovered the debt due to him without it. I confess that I do not feel the slightest doubt upon the question of the plaintiff's right to recover these costs.

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MARTIN, B.—I think that the rule ought to be discharged. It seems to me clear, that a party is not entitled to costs which are occasioned by his own negligence. The question is, what are the costs to which the plaintiff is entitled? And I am of opinion that he ought to be indemnified against all such costs and expenses as have been reasonably incurred in carrying on the suit, and nothing more. At common law, a plaintiff was only liable to his attorney for costs, and for such costs only as were properly incurred; but a defendant was not liable to the plaintiff for any costs. And if the attorney had sued the plaintiff in this case for these costs, and I had been on the jury, I should not have given them, as they were occasioned by the attorney's negligence. Now the Statute of Gloucester entitles a plaintiff to indemnify himself as to his costs, by recovering the amount of them from the defendant; but that means, as I think, such costs as are reasonably incurred. *Mr. Phipson* says, that a jury might give these costs; but I do not see how that bears upon the question, whether the costs are now to be taxed by an officer of the Court. I think that I exercise the soundest discretion by not imposing upon a defendant costs for which the plaintiff himself is not responsible. I understand that all the Masters of all the Courts were consulted upon the matter, and that they were unanimously of opinion that these costs ought not to be allowed. I am glad to be supported in the view I take by the opinions of so many gentlemen who are peculiarly conversant with the subject.

Rule dropped.

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June 5.

THE AUSTRALIAN ROYAL MAIL STEAM NAVIGATION COMPANY *v.* MARZETTI and Others.

The plaintiffs, a company incorporated for the purposes of conveying mails, passengers, and cargo, between Great Britain and the Cape of Good Hope and Australia, and for that purpose to construct and maintain steam and other vessels, and to do all such other matters as might be incidental to such undertaking, contracted with the defendants, by parol, for the supply by the latter to the company of a quantity of ale. The ale was delivered and paid for by the plaintiffs, but turned out to be unfit for use:—*Held*, that the defendants were liable, although the contract was not under the seal of the company.

THE declaration stated, that the plaintiffs, being about to despatch a steam vessel, called the “Australian” on a voyage from London to Australia and back, with goods and passengers, ordered and agreed to buy at certain prices of the defendants, carrying on the business of beer and ale merchants, a quantity of ale, of the description called Bass’s ale, in quart bottles, a quantity of ale of the same description in pint bottles, and a certain other quantity in pint bottles of ale called Indian ale, for the purpose, as the defendants well knew, of the same being stored on board the said vessel for sale, for the use of the said passengers; that the defendants agreed to supply the same in the way of their said business for the purpose aforesaid, and then promised the plaintiffs, that the same should be of the description aforesaid, and should be and be supplied in a condition reasonably fit and proper for the said purpose; that, although the defendants did supply the said quantities for the purpose aforesaid, and the plaintiffs paid for the same at the prices aforesaid, yet the said ale was not of the description aforesaid, but was of a different and inferior description, and was not fit and proper for the said purpose, nor supplied in a fit and proper condition, but was unsound and unwholesome, and badly and insufficiently bottled and corked; by reason whereof, &c.

The defendants pleaded, first, non assumpserunt.

Secondly.—That the ale was of the description agreed upon between the defendants and the plaintiffs, and was not of a different and inferior description.

Thirdly.—That the ale supplied by them was in a condi-

tion reasonably fit and proper for the purposes in the declaration mentioned.

Fourthly.—That the ale was not unsound or unwholesome; and

Fifthly.—That the ale was not badly or insufficiently bottled or corked.—Upon which, issues were joined.

At the trial, before *Pollock*, C. B., at the London Sittings after last Hilary Term, it appeared that the plaintiffs were a corporation aggregate, carrying on business in London, and that they were possessed of several large steam vessels, which they employed in carrying passengers and goods between England and Australia. By their charter, dated the 22nd of March, 1851, they were created a corporate body “for the purpose of undertaking the establishment and maintenance of a communication, by means of steam navigation, or otherwise, and the carrying of the royal mails, passengers, and cargo, between our United Kingdom of Great Britain and Ireland and the Cape of Good Hope and Australia; and, for that purpose, to construct, purchase, hire, charter, man, equip, and maintain steam and other ships or vessels, and to carry on and transact all such business, and do all such matters as may be incidental to such undertaking, or necessary or expedient, in order to the effectual prosecution thereof.” And the charter further declared, that the directors should have “full power and authority to make and enter into and effect all contracts, purchases, sales, and assurances on behalf of the said corporation, and generally to make, do, and execute all acts, deeds, matters, and things, which they shall consider necessary for the well ordering the affairs thereof, so as the same be in conformity with the provisions of these presents.” In October, 1853, the plaintiffs ordered of the defendants, who were bottled ale and beer merchants in London, a large quantity of ale, amounting to 355*l*., and this was shipped on board the plaintiffs’ vessel “*Australian*.” The ale consisted of Bass’s ale and India ale, and was in quart

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and pint bottles, which were inclosed in casks, and which were marked "1st use," "2nd use," and "3rd use." The contract under which this ale was shipped was in writing, but not under the seal of the company. On the return of the vessel to England, the plaintiffs applied to the defendants to take back the ale that remained; this the defendants refused to do; and the present action was brought to recover damages from the defendants, for having supplied ale in a condition not fit for the use of the passengers, and not of the quality ordered.

On the part of the defendants, it was contended, that they were not liable, as the contract was not under seal; and further, that there was no warranty that the ale, when shipped, should be in a condition reasonably fit for the use of the passengers. The Lord Chief Baron left it to the jury, to say whether the ale was in such condition; and the jury having found that it was not, a verdict was entered for the plaintiffs, damages 65*l.*, leave being reserved to the defendants to move to enter a nonsuit, if the Court should be of opinion that the contract should have been under the seal of the company.

Bramwell having obtained a rule nisi accordingly, and also on the ground of misdirection,

Sir *F. Thesiger* shewed cause.—The main objection raised by the defendants to the plaintiffs' right to retain the verdict is, that, the contract being executory and not under the corporate seal of the defendants, they are not bound by it. But the contract is an executed contract, as the goods were supplied and the price has been paid, and nothing remained to be done on the part of the plaintiffs. But, assuming the contract to be executory, the defendants' objection is equally untenable. The doctrine based on the distinction between the two classes of contracts, may now be considered as exploded: *Church v. The Imperial Gas*

Company(a), *Copper Miners' Company v. Fox*(b). Though, according to the general rule of law, a corporation cannot contract except under its corporate seal, it is, nevertheless, liable in respect of small matters which are of daily occurrence, and for those matters which the corporation by its very constitution is authorised and appointed to do. Now, the supply of food for the passengers is a matter which the company is authorised to provide, within the terms of their charter. The purchase of ale for the purposes of the voyage is a matter which is "necessary for the effectual prosecution of the undertaking." This case, therefore, falls within the exception to the general rule, as laid down in *East London Waterworks Company v. Bailey* (c), and which has been followed in many subsequent cases. The plaintiffs are also entitled to maintain this action, on the ground that the case falls precisely within the principle laid down by the Court of Common Pleas in *The Fishmongers' Company v. Robertson* (d), where *Tindal*, C. J., in delivering the judgment of the Court, says (e), "The question, therefore, becomes this, whether, in the case of a contract executed before action brought, where it appears that the defendants have received the whole benefit of the consideration for which they bargained, it is an answer to an action of assumpsit by the corporation, that the corporation itself was not originally bound by such contract, the same not having been made under their common seal. Upon the general ground of reason and justice no such answer can be set up. The defendants, having had the benefit of the performance by the corporation of the several stipulations into which they entered, have received the consideration for their own promise; such promise by them is, therefore, not nudum pactum; they never can want to sue the corporation upon the contract, in order to enforce the performance of those stipulations which

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(a) 6 A. & E. 848.

(d) 5 M. & Gr. 131.

(b) 16 Q. B. 229.

(e) Id. 193.

(c) 4 Bing. 283.

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have been already voluntarily performed; and, therefore, no sound reason can be suggested, why they should justify their refusal to perform the stipulations made by them, on the ground of inability to sue the corporation, which suit they can never want to sustain. It may possibly be the case, that, up to the time of the corporation adopting the contract, by performing the stipulations on their part, there was a want of mutuality, from the corporation not being compellable to perform their contract; and that the defendants might, during that interval, have the power to retract, and insist that their undertaking amounted to a nudum pactum only. But, after the adoption of the contract by the corporation, by performance on their part, upon general principles of reason, the right to set up this defence appears altogether to fail." The same principle is to be found in the following cases: *Finlay v. Bristol and Exeter Railway Company* (a), *Lowe v. London and North Western Railway Company* (b), and *Lamprell v. Billericay Union* (c).

The next objection, that the defendants are not responsible for supplying an article not fit for consumption, is equally untenable. Where goods are to be supplied for a particular purpose, there is an implied warranty that they shall be fit for that purpose. Here the ale was altogether unfit for use: *Jones v. Bright* (d), *Chanter v. Hopkins* (e), *Ollivant v. Bayley* (f), *Brown v. Edgington* (g).—He was then stopped by the Court upon this point.

Willes (*Bramwell* with him) in support of the rule.—First, this must be considered as an executory, and not an executed contract, in which case all the authorities shew, that the corporation is not bound, unless the contract be

(a) 7 Exch. 409.

(b) 21 L. J., Q. B., 361.

(c) 3 Exch. 286.

(d) 5 Bing. 533.

(e) 4 M. & W. 399.

(f) 5 Q. B. 288.

(g) 2 M. & Gr. 279.

under seal. The decisions of the Courts upon the question as to the distinction between executed and executory contracts, in respect of the liability of corporations, have not been uniform. It is unnecessary to refer to the different cases upon this subject, which are extremely numerous. The defendants are content to rest their defence upon the recent decision of this Court in *Finlay v. Bristol and Exeter Railway Company* (a), where it was held, that the company were not liable in an action for use and occupation for a period during which they had not occupied the premises, the demise to them being by parol. Parke, B., there says, "The expressions of my Brother Patteson, in delivering the judgment of the Court in *Beverley v. The Lincoln Gas Light and Coke Company* (b), would certainly seem to imply that a corporation could, under such circumstances as these, enter into a parol agreement for a yearly tenancy; but, although that judgment may be supported on other grounds, there are several recent cases in which the power of corporations to bind themselves without seal, has been discussed, and in which the doctrine there laid down has been disclaimed: *The Mayor of Ludlow v. Charlton* (c), *Church v. The Imperial Gas Light Company* (d), *Paine v. The Guardians of the Strand Union* (e)." In *Boileau v. Rutlin* (f), Parke, B., observes, that the dictum of Tindal, C. J., in *The Fishmongers' Company v. Robertson*, was unnecessary for the determination of that case. [Martin, B.—This is clearly an executed contract.]

Secondly, there was no warranty of the quality of the ale supplied. The defendants were not makers, but merely bottlers, and consequently they are responsible only for the way in which the ale is bottled.

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(a) 7 Exch. 409.

(b) 6 Ad. & E. 829.

(c) 6 M. & W. 815.

(d) 6 A. & E. 846.

(e) 8 Q. B. 326.

(f) 2 Exch. 665.

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POLLOCK, C. B.—I am of opinion that the rule ought to be discharged. The principle of the exception at common law, with respect to those matters for which a corporation may render itself liable, although done without its seal, is simply this, viz., that for all such small matters as it would be absurd and ridiculous for the corporation to use their common seal, they may contract by parol. It is unnecessary in this case to extend the principle of the common law, for it is now perfectly established by a series of authorities, that a corporation may, with respect to those matters for which they are expressly created, deal without seal. This principle is founded on justice and public convenience, and is in accordance with common sense. I am, therefore, of opinion, that the first point, that there was no contract, has no foundation. It has been urged, that this is an executory contract; but so far as the corporation are concerned, it is executed. They had bought the article, they had paid for it, and they had received it, and nothing further remained to be done in the execution of the contract; but it turned out that the article was not that which they had a right to expect; and, therefore, they are entitled to recover as upon an executed contract.

ALDERSON, B.—I think it is a very plain case, and that the rule ought to be discharged, and that it is not necessary to make any further observations upon it.

PLATT, B.—I also think it is a very plain case, and that the rule ought to be discharged. The declaration states, that, in consideration the corporation would pay a sum of money, the defendants undertook to do a certain act. The corporation paid the money, and nothing more remains to be done by them. It is preposterous to say, that, although the money of the corporation has been accepted by the defendants on their promise to do a certain act, they are not bound to do that act.

MARTIN, B.—The case of *The Fishmongers' Company v. Robertson* is precisely in point; and, if it were not, good sense would lead us to the same conclusion. It cannot be supposed, that, when a corporation has done every thing they were bound to do, and the other party has obtained the money, the latter are at liberty to break their contract. The second point is a question of fact; and I think the finding of the jury is right.

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Rule discharged (a).

(a) See *Henderson v. The Australian Royal Mail Steam Navigation Co.*, 5 E. & B.

BUTT v. THOMAS.

June 7.

THIS was an action of ejectment to recover the possession of a messuage and garden with the appurtenants, situate at Evington in the parish of Leigh, in the county of Gloucester, and a piece of ground, called Watts's Ground, otherwise Emott's Croft, situated in the said parish of Leigh; and by consent of the parties, and the order of a Judge, the following case was stated for the opinion of this Court, without any pleadings:—

Richard Barnes, late of Evington aforesaid, carpenter, deceased, made his last will, dated 22nd of April, 1812, duly executed and attested as the law then required for the

A testator, by his will, made in 1812, after giving the whole of his property to his wife for life, devised as follows:—

"Also I give to my grandson R. P. that house and garden now in the tenure of &c. Also, I give to my granddaughter A. P. this house which I now live in,

with the garden &c. Also, I give to my two granddaughters, S. P. and J. P., a house at T. Also I give to the said S. P. and J. P. a piece of arable land, now in the tenure of &c. Also I give to my grandson, R. P., 600*l.*; 5*l.* per cents. Also I give to my granddaughter, A. P., 600*l.*, 5*l.* per cents. Also I give to my two granddaughters, S. P. and J. P., 400*l.* each. In case either of them die without issue, that portion to be divided amongst the survivors."—Held, that A. P. took a greater estate than an estate for life in the property in question.

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devise of freehold estates, which was in the words and form following:—"I Richard Barnes, carpenter, of Evington in the parish of Leigh, in the county of Gloucester, being in sound mind, &c., do make and ordain this my last will and testament in the manner and form following: First, I will that all my debts and funeral expenses be paid and discharged by my executrix hereinafter named. I also give to my wife, Sarah Barnes, for the term of her natural life, all those two messuages, tenements, and lands now in my possession at Evington in the parish of Leigh. I also give to my wife Sarah Barnes, all that messuage and tenement, and lands thereunto belonging, being in the tenure of William Shain, situate at Twigworth in the out-hamlet of St. Mary de Lode, in the county and diocese of Gloucester. I also give to my wife, Sarah Barnes, all my goods and chattels and the interest of all my property during her natural life. Also I give to my grandson, Richard Preston, that house and garden now in the tenure of Hannah Kendall, likewise the orchard adjoining, likewise Piper's Hay, likewise a piece of arable land in the Leigh field, containing together about eight acres. Also I give to my granddaughter, Ann Preston, this house which I now live in, with the garden and orchard adjoining: also I give to her a ground called Watts's Ground, otherwise Emott's Croft. Also I give to my two granddaughters, Sarah Preston and Jane Preston, a house, garden, and orchard, situate at Twigworth, in the out-hamlet of St. Mary de Lode, in the county and diocese of Gloucester. Also I give to the said Sarah Preston and Jane Preston a piece of arable land in the Brook Length, shooting against Hatherley Meadow now in the tenure of William Preston, all to be equally divided. Also I give to my grandson, Richard Preston, 600*l.* in the five per cents. Bank of England. Also I give to my granddaughter, Ann Preston, 600*l.* in the five per cents. Bank of England. Also I give to my two granddaughters, Sarah Preston and Jane Preston, 400*l.*

each, now on bond in the Bank of England. In case either of them die without issue, that portion to be divided amongst the survivors. Also I give to my son-in-law, William Preston, 5*l.*, to be paid after our decease. Also I hereby appoint Thomas Trinder and Henry Trinder trustees for my wife and grandchildren. Also I give to Thomas Trinder and Henry Trinder the sum of five guineas each, and I appoint these my trustees to have all expenses allowed them. Also I appoint my wife, Sarah Barnes, executrix to this my last will and testament. In witness thereof I have hereunto set my hand and seal this twenty-second day of April, A. D. 1812.

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“ RICHARD BARNES.”

“ Witness—Thomas Trinder, Henry Trinder, James Lea.

“ I also appoint these my trustees, Thomas Trinder and Henry Trinder, to be in trust of these my several grandchildren of their estates and money till they each of them become twenty-one years of age.”

The testator died in December, 1813, without having revoked or altered his said will, leaving Sarah Barnes named in his said will, his widow, and Richard Preston, Ann Preston, Sarah Preston, and Jane Preston, his grandson and granddaughters, also respectively named in his said will. The said Richard Preston was, on the decease of the said testator, his heir-at-law.

The testator was at the date of his will, and at the time of his decease, seised in fee simple in possession of a messuage wherein he resided at the date of his will, with the garden and appurtenants thereunto belonging, situate at Evington aforesaid, and the said piece of land called Watts's Ground, otherwise Emott's Croft (being the premises devised by his said will to the said Ann Preston), as well as of the several other messuages and lands specifically mentioned in his said will. The premises in question (as well as the house, garden, and orchard at Twigworth,

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mentioned in the said will), were comprised in the devise to the said testator's wife for life.

The said Sarah Barnes, the widow of the said testator, died in December, 1815. The said Ann Preston intermarried, in the year 1817, with Richard Butt, and died in September, 1853, leaving the said Richard Butt, and the plaintiff John Butt, her eldest son and heir-at-law, surviving her. The said Richard Butt died in May, 1854.

The said Richard Preston made his will, dated 1830, duly executed and attested as the law then required for the devise of real estate, whereby he devised all the hereditaments to which he was entitled by descent from the said Richard Barnes, the testator, to his (the said Richard Preston, the testator's) son, Richard Barnes Preston, in fee. The said Richard Preston died in June, 1830, without having revoked or altered his said will, leaving the said Richard Barnes Preston, his only son and heir-at-law, surviving him. The said Richard Barnes Preston became bankrupt in 1846, and the assignees under such bankruptcy duly sold and conveyed his estate and interest (if any) in the premises sought to be recovered in this action to the defendant Philip Thomas.

The said Sarah Barnes, the widow of the said Richard Barnes, the testator, entered on his death into the possession of the premises sought to be recovered in this action, and continued in possession thereof down to his death; whereupon the said Richard Butt entered into possession, and continued in possession thereof down to his death, whereupon the defendant entered into possession, and has since been and is now in possession thereof.

The question for the opinion of the Court was, whether the said Ann Butt, formerly Ann Preston, took under the said will of the said Richard Barnes any, and what, greater estate than an estate for her life in the premises sought to be recovered in this action.

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Willes for the plaintiff (June 6).—Under the will of the testator, Ann Preston took an estate tail in the premises sought to be recovered. It is well established, that, in a will governed by the old law (a), a devise to a person indefinitely, with a limitation over in case he dies without issue, confers an estate tail by implication. *Machell v. Weeding* (b) affords a strong instance of the rule, for in that case there was an express devise for life; but Sir *L. Shadwell*, V. C., said, that he “considered it to be a settled point, that, whether an estate be given in fee, or for life, or generally without any particular limit as to its duration, if it be followed by a devise over in case of the devisee dying without issue, the devisee will take an estate tail.” In this case the testator gives to his wife a life interest in all his property. He then begins a new series of devises, by giving to his grandchildren, first, his real property without words of limitation, and afterwards his personalty; and he then proceeds to say, “In case either of them die without issue, that portion to be divided amongst the survivors.” Those words apply to the gift of the realty, and enlarge the indefinite estate into an estate of inheritance. All the authorities on the subject are collected in *Jarman on Wills*, Vol. 1, p. 463, 2nd ed.

Rudall for the defendant.—It is conceded, that, if the devise to Ann Preston had stood alone, she would have taken an estate for life only; it ought, therefore, clearly to appear that the testator intended to give her a larger estate. The devise of the realty is perfectly distinct from the gift of the personalty; and the words “in case either of them die without issue, that portion to be divided amongst the survivors,” cannot apply to the real estate. The devisees do not take “*portions*” of the real estate. The word “portion” means “share,” and has reference to

(a) As to wills made or re-published since 1837, see the 1 Vict. c. 26, s. 29.

(b) 8 Sim. 4.

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the gift of monies. The testator never could have intended, by the word "portion," to include the "estates" which he had given in severalty to his grandchildren for life. *Doe v. Westley (a)* shews that the words in the disputed clause do not refer to the whole property disposed of by the will. There the testator, after giving several pecuniary legacies, the bequest of each commencing with the word "item," devised as follows:—"Item, I give and bequeath to C. D. all that my messuage and tenement wherein I now dwell, with the garden and all the appurtenances thereunto belonging; and I also give to the said C. D. all my household goods and chattels and implements of household within doors and without, all for her own disposing free will and pleasure, immediately after my decease." And it was held, that C. D. took only an estate for life in the premises devised to her. *Bayley, J.*, there said, "In order to say that more than a life estate passed, we should require words expressing a plain intent to that effect. Now, stopping after the word *garden* in the demise to *Mary Westley* [C.D.] there is nothing to shew the quantum of interest that she was to take. Then the testator proceeds, 'I also give, &c.' It is an old observation that the introduction of the word 'item' shews that the testator is dealing with a new subject, and that the words following apply to that only, and not to the preceding matter, *unless the intention to do so is plain.*" *Doe d. Child v. Wright (b)* is also an authority for construing the devise of the realty and bequest of the personalty as distinct.

But assuming that the clause of survivorship applies to the gift of the realty, it did not create an estate tail, for the proximate event, viz. the failure of issue, never took effect. There is a life estate, with an executory devise over, which has failed. The gift over being to the survivors of certain ascertained persons, the testator

(a) 4 B. & C. 667.

(b) 8 T. R. 64.

intended a personal benefit for them, and therefore the gift over must be taken to refer, not to an indefinite failure of issue, but to a failure of issue to take place within the lives of the executory devisees, and that event not having happened, the executory devise fails and the life estate becomes absolute: *Greenwood v. Verdon* (a). *Spirit v. Bence* (b) decided, that, on a devise of "all my pasture lands in D. to my youngest son Henry, and also all bargains, grants, and covenants which I have from B, my son Henry shall enjoy and his heirs for ever; and for lack of heirs of his body then to remain to my son Francis for ever," Henry shall have an estate for life only, and not an estate tail of the pasture by implication; for the heir cannot be disinherited without a very plain intent appears. And in *Thornhill v. Hall* (c) Lord Brougham, C., held it to be a rule which admitted of no exception, that, in construing written instruments, when an interest is given or an estate conveyed in one clause of the instrument in clear and decisive terms, such interest or estate cannot be taken away or cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that interest or estate. *Roe v. Jeffery* (d) also shews that this is an executory devise. It was there held, that, under a devise to F. F. and his heirs for ever, and in case he should depart this life and leave no issue, then to E. M. and S. or the survivor or survivors of them, share and share alike, the devise to E. M. and S. was a good executory devise.

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Willes in reply.—The intention of the testator must be gathered from the whole instrument, and the meaning

(a) 1 K. & J. 74.

(b) Cro. Car. 368.

(c) 2 Cl. & F. 22.

(d) 7 T. R. 589.

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of this particular clause must be ascertained by that canon of construction. The testator clearly intended to dispose of the real estate. The case of *Roe v. Jeffery* is stated, in Jarman on Wills, vol. 2, p. 438, 2nd edition, to be a singular case, and that it must rest on its "peculiar circumstances," viz. "on the circumstance of the devises over being exclusively for life." The learned author adds:—"At all events it is clear, that the doctrine of the case of *Roe v. Jeffery* applies only where *all* the ulterior estates are merely for life; for, in *Barlow v. Salter* (a), Sir W. Grant refused to extend it even to a bequest of personal estate, where *one* of several ulterior legatees took a *life* interest, and the others *absolutely*. It appears in some of the earlier cases (said his Honor), that the Judges inclined to hold these words to mean without issue at the death of the person named; but, ever since the case of *Beauclerk v. Dormer* (b), I think a different rule has prevailed; and it is now settled, that, unless there are expressions or circumstances from which it can be collected that these words are used in a more confined sense, they are to have their legal signification, viz. death without issue generally."

POLLOCK, C. B. [His Lordship, after reading the question for the opinion of the Court, proceeded]—Upon the question presented in this shape, we are not bound to give any opinion as to the precise nature of the estate which Ann Butt took under the will. I am of opinion, that the plaintiff is entitled to our judgment, as I think that Ann Butt took an estate greater than an estate for life. The testator gives to his wife some real property for the term of her natural life; he then gives to her a messuage and lands in the tenure of William Shain; but, in that gift, he omits the words "for the term of her natural life," but adds, "I also give to my wife all my goods and chattels and the

(a) 17 Ves. 479.

(b) 2 Atk. 308.

interest of all my property during her natural life." He then gives to his grandson, Richard Preston, one estate, and then to Ann Preston, his granddaughter, the mother of the plaintiff, another estate, each consisting of a residence with apparently some outlying lots of land. He then gives to his two granddaughters, Sarah Preston and Jane Preston together, a house, garden, and orchard, also a piece of arable land in the Brook, concluding this clause with the following words,—“all to be equally divided.” The testator, therefore, had no objection to the house and land given to these two persons being equally divided between them. He then proceeds,—“also I give,” and then he gives to each of the four persons previously named a portion of some funded property. Richard is to take 600*l.* in the 5*l.* per cents, and Ann 600*l.*, and Sarah and Jane 400*l.* Then he says, that, “*in case either of them die without issue, that portion to be divided amongst the survivors.*” Now the question is, what is meant by these words. If the testator intended them to apply to the entire property left by the will, whether real or personal, the conclusion is, according to all the authorities, that, as he contemplated the death of some of the parties without issue, in such event their share was to go, not to the heir, but to the other parties. He did not mean it to go to the heir, if they died without issue, as that would be a very strange and unusual devise. It is to go to the survivors, if either of the parties named die without issue. But the defendant contends, that, if they die without issue, it is to go to the heir-at-law, who happens to be one of the devisees. I cannot so read the will. I think the only doubt that can arise on the will is, whether this passage applies to *all* the property left to Richard and Jane, or *only to the personal property*. The word “portion” is ambiguous. It may only mean,—and it frequently merely means, a part of some larger amount; and it may also mean the “portion” as used in the sense in

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which a person speaks of providing for his children; but I observe that at the end of the will the testator puts his real and personal property together, for he says, "I also appoint these my trustees, Thomas Trinder and Henry Trinder, to be in trust of these my several grandchildren of their estates and money, till they each of them become twenty-one years of age." I am, therefore, inclined to think, that, by the expression "in case either of them die without issue, that portion to be divided amongst the survivors," he intended, that, whatever he gave to any of these four persons, in the event of either of them dying without issue, should be divided amongst the survivors. I think that the words at the conclusion of these devises and bequests apply to the *whole* property; and such being the case, according to the authorities, the estate is to go over in the event of their dying without issue.; and, consequently, Ann Butt took more than an estate for life. I am therefore of opinion that the plaintiff is entitled to judgment.

ALDERSON, B.—I am also of opinion, that Ann Butt took a greater estate than an estate for life under the testator's will. If she did, that is sufficient to determine the action of ejectment, in which her eldest son and heir-at-law is the plaintiff, and the person who claimed under the assignees of the heir-at-law of the original testator is the defendant, since his defence is, that the property is gone from Ann Butt and her issue. If it were necessary to decide what was the precise estate which she took, I should desire time to consider whether she took an estate tail or an estate in fee; but that point is not necessary for the determination of this case. At first, I thought it might have been argued, that the clause "in case either of them die without issue, that portion to be divided amongst the survivors," applied only to the previous devise of personalty to the two granddaughters, Sarah Preston and Jane Preston; but the word

"survivors," in the plural number, being used excludes that construction. The testator begins by limiting the estates after the expiration of the life of his wife, which shews that he contemplated the difference between giving an estate for life and a larger estate, for where he really means to give an estate for life, he says so in express terms. Then he afterwards uses general words, and says, "I give to Richard Preston" such and such land, and so on. The rule of law is, that where the word "house" or "land" stands alone in a will, the gift is to be presumed to be an estate for life. But I must say, that, generally speaking, the rule of law entirely repeals the intention of the testator: still, inasmuch as the rule of law is so, we must be governed by it. The Courts, however, avail themselves of small circumstances, to carry into effect what they see is, in many cases, the actual intention of the testator. The scope of the will is this,—I give such and such land to Richard (who was heir-at-law); I give such and such land in like manner to Ann and Jane, and the portion in question to be divided equally between the two granddaughters; then I give 600*l.* to Richard (then heir-at-law), 600*l.* to Ann, and I give 400*l.* each to the two other granddaughters. There are certain devises as to land and to personal property, and then comes the clause "in case either of them (that is *any* of them) die without issue, that portion to be divided amongst the survivors." But it is to be divided only between the two last, who are left together: it is to the *survivors*. That is the conclusion arising from the true construction of the words. What is to be divided amongst the survivors? The portion which belongs to the party who dies without issue. What has been the portion that has previously been given to the party who dies without issue? The piece of land and a sum of money. Suppose it had been "in case any of them die without issue, then the estate and money to go over to the survivors, equally to be di-

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vided," would not that be a clear indication of intention, that, unless they die without issue, it is not to go over? The will does not say to whom it is to go, but it must be to the persons who survive their parents. That is the necessary implication, if the latter words be applied to all the previous devises of land and money which are contained in the will. That is the view which I consider we ought to take of it, as one which clearly accords with the actual intention of the testator; and I entertain no doubt upon the question.

PLATT, B.—I think the meaning of this will is clear. The principal objects of the testator's bounty were his widow and four grandchildren. In the event of his death during the lifetime of his wife, he gives to her a life interest in all the property. Upon her death he divides his real property into three parts, one part he gives to his grandson Richard, another to his granddaughter Ann, and a third to the two remaining granddaughters, equally to be divided between them. That is the class of persons who are to be benefited by his will made after the death of his own children. After thus dealing with the realty, he proceeds to devise what remains of his personalty after the bequest to his wife, for he had already bequeathed all his goods to his wife (which she might have sold), and the remainder of the estate, consisting of stock, he directs to be converted into money, and 600*l.* to be given to Richard, the same sum to Ann, and 400*l.* to each of the other two. After those bequests come these words:—"In case either of them die without issue, that portion to be divided amongst the survivors." It is clear the testator meant this to apply to more than one of the survivors; therefore it could not apply to the two last-named granddaughters, who were to take 400*l.* a piece. Now suppose, that, in this case, Ann had lived for thirty years after

her grandmother's death, and that she had received her 600*l.*, and had spent it; in the event of her death without issue, was her estate to be responsible for that 600*l.* to be divided amongst the survivors? Such a supposition is preposterous. I think there is no qualification of the bequests of the personalty. If the words had been these—"If either of them die without issue during the life of their grandmother, then that portion to be divided amongst the survivors," there might have been some color for the argument. But it is clear that the clause cannot be so restricted; and, consequently, if it applies to the money, the survivors would receive a double share. If, then, it cannot be applied to that, the land alone remains. If, as argued by the defendant's counsel, the clause does not apply to the real estate, there is nothing for it to operate upon. It was perfectly useless, for if Ann was to take only an estate for life, it made no difference whether she died with or without issue. The only case to which it can be applied, is that in which an estate in Ann was created greater than an estate for life. On these short grounds, it seems to me to be clear what the testator's intention was. The whole will must be taken together, to ascertain its real meaning; and if, from the language used, the real object of the testator can be collected, such intention ought to be carried into effect. If Ann Butt had more than an estate for life, the plaintiff is entitled to recover; and I am of opinion that she had.

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MARTIN, B.—I am also of opinion that the plaintiff is entitled to judgment. Mr. *Rudall* made two points, one of which is an important one, viz. whether, upon the true construction of the will, the sentence containing the words "in case either of them die without issue, that portion to be divided amongst the survivors," overrides all that precedes it. That is simply a question as to the meaning of a written document containing the sentence. We must collect the testator's meaning, as well as we can, from the writing itself.

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It is not what may have been the real intention of the testator, but what he has expressed in writing, which must guide us to the true construction of the instrument. Now the testator, after stating that his debts shall be paid, proceeds,—“I also give to my wife” all my property, during her natural life; and then he makes certain devises to his grandchildren, with the words, “also I give to my grandson, Richard, that house and garden now in the tenure of Hannah Kendall, &c. ;” “also I give to my granddaughter, Ann Preston, this house which I now live in, with the garden, &c. ; and then he proceeds, “also I give to my grandson, Richard Preston, 600*l.* in the 5*l.* per cents. Bank of England; also I give to my granddaughter, Ann Preston, 600*l.* in the 5*l.* per cents. Bank of England; also I give to my granddaughters, Sarah Preston and Jane Preston, 400*l.* each, now on bond in the Bank of England.” Having thus introduced these six devises as to the real and personal property, there comes this sentence—“In case either of them die without issue, that portion to be divided amongst the survivors.” Now, the word being “survivors,” clearly shews that he did not mean that Sarah Preston’s and Jane Preston’s (the two grandchildren whom he last named) portion was to be divided. According to the best construction I can give to the will, and one which seems to me to be according to common sense, is, that he intended that clause to override the whole will, and by it to declare, that, in case any of his grandchildren died without issue, “that portion,” that is, the share of the property which had been previously bequeathed by him to them, should be divided amongst the survivors. If that is so, what is the construction to be put upon it? Mr. *Rudall* contends, that it is an estate for life to the grandchildren, with an executory devise over to the survivors, in the event of any of the grandchildren dying without issue in the lifetime of those survivors. The first observation to be made on this argument is, that giving that construction to the clause would utterly defeat the obvious intention of the tes-

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tator, which was, that the issue should derive a benefit. I think that the intention of the testator, as expressed in the will, is this,—that, if any of the grandchildren should have issue, they and their issue should have the full advantage of the property devised by him to them; and if there were no issue of any that died, then it should go to the survivors. I think that we ought, as far as we can, to administer the law in accordance with what has been laid down by our predecessors; and the case cited by Mr. *Rudall*, of *Greenwood v. Verdon*, is distinguishable from this. With respect to the case of *Roe v. Jeffery*, Mr. *Willes* quoted a paragraph from Mr. Jarman's book, where that case is said to be an exceptional one; but I also think there is a material distinction between that case and this. I am therefore of opinion, that the clause in question overrides all that precedes it; and that the will gives an estate tail to the grandchildren in the realty, with cross remainders over amongst the survivors.

Judgment for the plaintiff.

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Under the 36th section of the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, a party who has recovered judgment against a company is not precluded from issuing execution against the shareholders who have not paid up the full amount of their shares, though lands of the company have been extended under an *elegit*, if the proceeds of the lands be insufficient to satisfy the debt.

If a sum certain has been actually received from the rents of the land extended under the *elegit*, the *scire facias* can only issue for the residue of the debt; but where no sum has been received, and the only means of satisfying the debt arises from the future rents, it is in the discretion of the Court whether they will permit the *scire facias* to issue. And where a judgment creditor for 300*l.* issued an *elegit* under which lands of the company were extended of the annual value of 10*s.* only, and the creditor did not take actual possession of the lands, it was held that he might issue a *scire facias* against the shareholders for the whole amount of his debt.

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THIS was a proceeding by *scire facias* against the defendant, as a shareholder in the Derbyshire, Staffordshire, and Worcestershire Railway Company.—The declaration recited that the plaintiff, on the 22nd of June, 1853, recovered against the company a judgment for 1572*l.*; and that, since the recovery of such judgment, a part of the money so recovered had been paid and satisfied to the plaintiff; but the sum of 800*l.* still remained unpaid and unsatisfied to him from the company upon the said judgment, and for which sum the plaintiff is entitled to execution thereon; that execution at law, by writs of *fieri facias* and *elegit*, had issued for the said sum of 800*l.* against the property and effects of the company, but there could not be found sufficient of such property and effects whereon to levy such execution, by or under either of the said writs; and the said sum of 800*l.*, together with interest thereon, &c., still remained wholly due, unpaid, and unsatisfied upon the judgment: that the defendant, before and at the time of the recovery of the judgment, and thence continually hitherto, was and is a shareholder in the company of fifty-five shares of 20*l.* each in the capital of the company, upon which shares a sum of 4*l.* 10*s.* only on each share had been paid up, leaving altogether upon and in respect of the whole of the said shares the sum of 852*l.* 10*s.* not paid up by the defendant.—The writ then commanded the defendant to appear and shew cause why execution should not issue against him for the sum of 852*l.* 10*s.*, being the amount of shares not paid up.

Plea:—That, before the issuing of the said writ of *scire facias*, the plaintiff, for the recovery of the amount of the said judgment, issued a writ of *elegit*, directed to the sheriff of Staffordshire, by virtue of which the sheriff afterwards,

and before the issuing of the writ of *scire facias*, delivered to the plaintiff certain lands, of which the company was seised in fee, to hold to the plaintiff until his said debt should be satisfied.—The plea then set out the sheriff's return, by which it appeared that the lands taken amounted to seven acres, and were of the annual value of 10*s*. The plea concluded by alleging that the execution so levied remained in full force.

Replication:—That the writ of *elegit* in the plea is the same writ of *elegit* in the declaration mentioned; and that the plaintiff had not obtained or taken actual possession of the said lands or any of them, or any part thereof, nor had he thereof levied the sum of money and interest in the said writ mentioned or either of them, or any part thereof; and that the lands were not, nor are they, sufficient whereon to levy the money and interest in the said writ mentioned.

Demurrer and joinder.

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Kemplay in support of the demurrer (May 2).—The question turns on the construction of the 36th section of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), which enacts, that "if any execution either at law or in equity shall have been issued against the property or effects of the Company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any of the shareholders to the extent of their shares respectively in the capital of the company not then paid up: Provided always, that no such execution shall issue against any shareholder, except upon an order of the Court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open Court, after sufficient notice in writing to the persons sought to be charged, and upon such motion such Court may order execution to issue accordingly; and for the purpose of ascertaining the names of the shareholders, and of the amount of capital remaining to be paid upon their respective shares, it shall be lawful for any person entitled to any such execution at all reasonable times

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to inspect the register of shareholders without fee." The defendant contends, that the plaintiff has, by proceeding against the lands of the company by elegit, barred himself from proceeding against the individual shareholders. The lands have been extended; and, as legal seisin has been delivered to the plaintiff, he is not precluded from taking possession of them at any time. The replication is therefore bad, as it sets up matter which is wholly immaterial and no answer to the plea. The plaintiff will rely upon the recent case of *Regina v. The Derbyshire, Staffordshire, and Worcestershire Railway Company* (a), where, an elegit having been issued, and the proceeds of the lands being insufficient to satisfy the debt, the Court granted a mandamus, commanding the company to give the creditor an inspection of the register of shareholders. The distinction between that case and this is, that there the proceeding was against the company itself, and not against the shareholders. [*Martin, B.*—According to that argument, the creditor is placed in this dilemma: he is bound in the first instance to proceed against the property and effects of the company; and if they possess an acre of land only, he is barred from further proceedings against the property of the shareholders.]

In the next place, the proceedings are defective in not stating to what amount the plaintiff is entitled, after deducting the proceeds of the elegit. Although the present value of the land taken under the elegit is small, it may be, that at some future time the land may become extremely valuable. Prior to the 1 & 2 Vict. c. 110, s. 11, the sheriff delivered to the judgment creditor actual possession of a moiety of the land extended under the elegit; but since that Act, legal possession only is given, which entitles the judgment creditor to maintain ejectment, and he is bound to account to the Court out of which the execution issues for all he receives under it. Therefore, the scire facias

(a) 3 E. & B. 784.

ought to state the amount which remains unsatisfied, otherwise the sheriff cannot tell for what sum he ought to levy.

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Hayes contrà.—The case of *Regina v. The Derbyshire, &c. Railway Company* is a direct authority that the plaintiff is not barred by the *elegit*. It was there held, that a party who has recovered judgment against a company is not precluded from issuing execution against the shareholders who have not paid up the full amount of capital on their shares, though the lands of the company have been delivered on *elegit*, if the proceeds of the lands be insufficient to satisfy the debt. Lord *Campbell*, C. J., there said: "There are two conditions to be fulfilled before the creditor proceeds against the individual shareholders: first, that 'any execution' shall have issued against the property of the company; secondly, that there cannot be found sufficient whereon to levy such execution." [*Parke* B.—The difficulty which occurs to me is this: The plaintiff admits that he has received something under the *elegit*, but he does not state how much. It seems to me, that he ought to shew how much of the debt remains unsatisfied, for the purpose of guiding the sheriff as to the amount for which he is to levy.] The plaintiff in effect alleges, that he has not received anything under the *elegit*. The plaintiff is not bound to wait for any length of time till the execution shall be satisfied; he is entitled to receive the fruits of it immediately. The declaration follows the statute. [*Martin*, B.—It appears to me, that if the *elegit* does not satisfy the debt, the creditor is entitled to proceed for what remains due. *Pollock*, C. B.—The plaintiff contends that the land is of no real value, on the principle *de minimis non curat lex*, the rent being 10s. a-year.] The plaintiff in effect alleges, that he is proceeding for the whole debt, with the exception of that portion of it which he expressly alleges has been satisfied.

Kemplay replied.

Cur. adv. vult.

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The judgment of the Court was now delivered by

POLLOCK, C. B.—In this case the defendant has demurred to the replication to the defendant's plea to a scire facias, founded on the 36th section of the Companies Clauses Act, 8 & 9 Vict. c. 16. [His Lordship, after stating the pleadings, proceeded:] The objection to the replication is, that the refusal of the plaintiff to take actual possession is wholly immaterial, if the lands have been duly extended under the elegit, and legal possession delivered to the plaintiff by the sheriff. This prevents him from having any further execution of any kind against the defendant in the action, unless he be evicted. Formerly, actual possession was delivered (a), but now legal possession only is delivered, which gives him a title to sue in ejectment.

The defendant then insists, first, that the plaintiff, by the execution of the elegit, is debarred of all further execution (unless he should be evicted), not only against the company, but also, under the 36th section, against members to the extent of their shares in the capital not then paid up. But to this it was properly answered, that the section gives a remedy against the shareholders if the debt due should not be actually satisfied; and this point was decided by the Court of Queen's Bench in *Regina v. The Derbyshire, &c. Railway Company* (b). That Court held, that the elegit, though a bar to a further execution against the corporation, the defendants in that action, was no bar to the proceeding under the 36th section, and against the shareholders. In this we entirely agree. It was then objected, that, as there certainly had been an elegit, and a delivery under that elegit of some lands, and a return filed of record, the scire facias could not issue for the *whole* debt, but only for the part unsatisfied; and it is only on that part of the case that we have felt any doubt.

The legislature in express terms have given a remedy

(a) 2 Tidd, 1037, 9th edit.

(b) 3 E. & B. 784.

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against the shareholders by order of the Court, after execution against the company has failed to satisfy the debt; and the Court must be satisfied, before giving that order, not only that execution has issued and been unsuccessful (which must be stated in the scire facias), but also that due pains have been taken to obtain more: *Devereux v. The Kilkenny Railway Company (a)*. What, then, must be done if the execution against the company be partially successful? If part of the debt has been actually levied and reduced into money, a scire facias could not, we think, be supported for the whole amount. Though an execution must always follow the judgment if there has been no levy, yet if part has been levied under a fieri facias that writ must be returned before a second execution can be issued; and the second writ must recite that all the money for which judgment was given was not levied: Tidd, 2nd vol., 922. And if, after a part of a debt has been levied on a judgment, and a scire facias becomes necessary, the proper form, according to Tidd's Practical Forms, 180, is to recite the writ and return and shew how much has been levied. We think we should adapt, as nearly as can be done, the ancient forms to the new proceeding under the 36th section; and if this were a case where a part of the debt had been actually levied by the seizure and sale of chattels under a fieri facias, we should have felt no doubt that the writ of scire facias ought to have recited that levy, and limited the execution to the issue for the residue. But the form of proceeding by elegit against the lands creates the difficulty under this section—a difficulty which never occurs at common law, where the execution of the elegit on the land is an absolute bar to all further remedy on the judgment. If a certain sum had been *actually received* from the chattels, or out of the extended rents of the estate delivered under the elegit, there would have been no difficulty in stating

(a) 5 Exch. 834.

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the levy of that part, and in calling on the shareholders to shew cause why the execution should not issue for the residue. In such a case, the legislature cannot be supposed to have intended an execution to issue for the full amount. But where no sum certain has been received, and the only means arise from the future rents of the land for satisfying the debt, which is by law due and payable instantly, did the legislature intend that the execution should not issue for the full amount of the debt? It may be said, that if land of the company to the full value of the debt were extended, out of the rents of which the debt would be discharged in a short time, it would be hard to allow the shareholders to be called on to pay the full amount instantly. For instance, to put the strongest case, if land, the rent of which were 1000*l.* per annum, were extended for a debt of 1000*l.*, could it be intended that the creditor should have a remedy by execution against the shareholders for that debt? It certainly seems at first sight to be contrary to their intention in such a case, but it is to be considered that the Court has a discretion to permit the *scire facias* to have execution to issue or not. In such an extreme case they might refuse it; but on the other hand it seems highly reasonable that the Court should possess that power in all cases, in order to effect the immediate payment of the debt in cash; and if the extent of land to the full value of the debt under an *elegit* against the company is no bar to an execution for the same debt against the shareholders, *a fortiori* the extent of lands of less than the value of the debt cannot be. Therefore, on full consideration of the case, we think that the extent of land to the value of 10*s.* a-year is no answer to a *scire facias* for the whole.

Further, it will be found that there is no mode by which the present value of the 10*s.* a year could be ascertained, and so the amount of the residue fixed, for which execution ought to issue. If the rent to be recovered were an annuity for a number of years certain, its value could be

easily calculated according to the current rate of interest; or if it were for the whole number of years it would take to pay off the debt of 800*l.* and interest, it could be; but the rent extended is, in truth, an annuity defeasible by payment of the debt at any time by levy on the shareholders, and the value of that defeasible annuity could not possibly be ascertained.

Therefore, we think that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

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THE declaration commenced by stating that the plaintiffs sued the defendant as the clerk, for the time being, to the trustees for carrying into execution the several purposes of the 3 & 4 Will. 4, c. cxiii., for, "amongst other things, better preserving the harbour of Maryport."

The first count stated, that a vessel called the "James," being a vessel liable under the said statute to the tonnage and harbour dues of the said harbour, whereof the plaintiffs

By the 3 & 4 Will. 4, c. cxiii., "An Act for better preserving the harbour of Maryport," &c., certain trustees were appointed for carrying out the Act. The trustees acted gratuitously; the

property in the harbour was vested in them, and they were empowered to elect a harbour master, and other officers and servants connected with the harbour, with power also to discharge them. The harbour-master was empowered to direct the situation in which a vessel entering the harbour was to be moored. The trustees were also empowered to make bye-laws as to the management of the harbour, and to impose tonnage rates upon vessels using it, and to borrow money on such rates, and to apply the proceeds in payment of the interest of the money borrowed, and of the costs and expenses attending the carrying into execution the purposes of the Act connected with the harbour, and also in the reduction of the capital borrowed:—*Held*, that the trustees were not liable, either, first, for the acts of the harbour-master in directing a vessel to be moored in an improper place, whereby it received damage; or, secondly, for an injury occasioned to a vessel by an accumulation of rubbish in the harbour.

Held, also, that although the trustees had almost an absolute discretion (with certain exceptions) in the appropriation of the fund for the management of the harbour, they would not have been liable for the accident arising from the accumulation of rubbish in the harbour, if they had been in possession of funds.

A declaration which charges a breach of duty, must contain an allegation from which the duty can be inferred, otherwise the declaration is bad.

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were, at the times hereinafter mentioned, and still are owners, had on the 3rd of June, 1854, and just before the committing of the grievances thereafter alleged, lawfully entered and was then using the said harbour, and thereupon became and was under and subject to the control, guidance, and superintendence in the said harbour of the said trustees and their harbour-master and servants, appointed in pursuance of the said Act. Yet the said trustees, by their said harbour-master and servants, then wrongfully and negligently and carelessly caused the said vessel to be moored, anchored, and placed within the said harbour, in a berth and place there, which berth and place was then, as the said trustees and their said harbour-master well knew, an unsafe and improper berth and place for such vessel to be moored, anchored, or placed in; in consequence whereof the said vessel was greatly injured.

Second count—For that the said trustees, on the day and year aforesaid, received the aforesaid vessel into their said harbour, and had the care, government, and direction thereof, under and pursuant to the first-mentioned Act of Parliament. Yet the said trustees, by their said harbour-master and servant, behaved so carelessly and negligently in the premises, that, by reason of such carelessness and negligence, the said vessel, whilst the same so was in such their care, government, and direction, became greatly damaged and injured.

Third count—For that the said trustees so negligently preserved and kept the said harbour, and so wrongfully and improperly suffered and permitted to be accumulated therein divers large quantities of coals, rubbish, and other matters and things, contrary to their duty in that behalf, that by reason thereof the said harbour became and was unsafe, and the said vessel, being lawfully therein as aforesaid, became and was thereby damaged. And by reason of the premises respectively aforesaid, the said vessel, to wit, on the day aforesaid, became and was for sixty days thereafter,

unseaworthy and useless to the said owners thereof, who had been necessarily put to and obliged to incur great expense in and about the repairs of the said injuries.

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Plea:—That the said supposed grievances were *bonâ fide* done in pursuance of and by the authority of an Act of Parliament, passed in the session of Parliament held in the 3rd and 4th years of the reign of William 4th, intituled, "An Act for the better preserving the harbour of Maryport, and for lighting and otherwise improving the township of Maryport, in the county of Cumberland."

Demurrer and joinder.

The case was argued last Term (May 1,) by

Quain in support of the demurrer, when the Court held the plea to be clearly bad, and called upon

Cowling contra.—The question then depends upon the validity of the declaration, which is clearly bad. The first and second counts stand upon the same footing. The action is against the defendants, *as trustees* under the Act of Parliament, for what is alleged to be negligence on the part of the harbour-master. The defendants are charged personally, and the question is, whether they are liable for the acts of the harbour-master. It is submitted that they are not; for, although he is called the defendants' *servant*, the Act itself shews in what respect he is to be considered as their servant; and it clearly appears from the Act that the trustees are not responsible for the personal default of their harbour-master. By the 7th section of the Act, (3 & 4 Will. 4, c. cxiii.) certain trustees, therein named, are appointed for carrying into execution the several purposes of the Act. By sect. 14, no person shall be capable of acting as a trustee "during the time that he shall hold or enjoy any office or place of profit or emolument under this Act, or in any contract

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under this Act, in which he may be directly or indirectly concerned, or in any matter wherein he shall be in anywise personally or beneficially interested, except as a creditor on the rates, &c., by this Act authorised." The trustees, therefore, are not either a private body or a corporation created for their own personal benefit. The 15th section provides for the election of trustees in the place of such as shall become incapable of acting. Section 17 regulates their meetings; and section 21 empowers the trustees to appoint a harbour-master and other officers, and to remove them and to elect other persons in their stead, and to fix their salaries. Section 47 enacts, that "it shall be lawful for any person appointed in pursuance of this Act to act as harbour-master within the said harbour of Maryport, to direct any person having the command of any vessel entering into or being within the said harbour to moor, anchor, and place the same in such situation within the said harbour as the said harbour-master shall direct; and in case the master of such vessel shall refuse or neglect to remove the same as soon as may be after being required, and to moor, anchor, and place the same as the said harbour-master shall direct, he shall for every such offence forfeit and pay any sum not exceeding 10*l.*; and it shall be lawful for the said harbour-master, and such other persons as he shall call to his assistance, to remove or cause to be removed the said vessel in such manner as he shall deem necessary; and such master shall pay all the charges and expenses attending the removing such vessel, after such direction, refusal, or neglect as aforesaid, such charges and expenses to be recovered in manner herein directed with respect to the recovery of penalties and forfeitures," &c. It is clear from these sections, that the trustees are not individually responsible for the personal default of their harbour-master. In *Duncan v. Findlater* (a),

(a) 6 Cl. & F. 894.

Lord *Cottenham*, C., in delivering his judgment, said, "In England we have long held, that trustees of a turnpike road are not liable in cases of this sort: *Baker v. Harris*(a), *Humphries v. Mears*(b), and *Hall v. Smith*(c). In all these cases it was distinctly held, that such trustees are not answerable but for their own personal default."

The third count is also insufficient. It does not state precisely what the powers are which the trustees possess under the Act. The 30th section empowers the trustees to receive a tonnage rate from vessels using the harbour. Section 48, amongst other matters, inflicts a penalty upon persons throwing rubbish into the harbour, and the section concludes as follows: "and the said harbour-master is hereby authorised, upon any neglect or refusal to remove any such obstruction as aforesaid, to cause the same to be removed at the expense of the owners thereof, in the same manner as is hereinbefore directed in the cases of the removal of vessels." The 140th section (d) provides for the applica-

(a) 4 M. & S. 27.

(b) 1 M. & Ry. 187.

(c) 2 Bing. 156.

(d) That section enacts, that "the monies to arise or be received by or from the tonnage rates or dues, or other duties by this Act granted, connected with the said harbour, and all other monies which may be borrowed on the security hereof, and all other monies which may arise or be received by virtue of this Act, connected with the said harbour, shall be, and the same are hereby vested in the said trustees, and shall be applied by the said trustees in manner following, that is to say, in the first place, in paying and discharging so much of the costs, charges, and expenses which shall have been

incurred in applying for, or which shall be in any manner incident to the obtaining and passing of, this Act, so far as the same relates to the said harbour, with interest for any money which may have been advanced for that purpose, as the said trustees shall direct; in the next place, in paying and discharging the annual interest of any money which may be borrowed on the authority of this Act, for the purposes of or connected with the said harbour; in the next place, in paying and discharging all other costs, charges, and expenses attending the carrying into execution the several purposes of this Act connected with or relating to the said harbour, and the other works belonging thereto or con-

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tion of the tonnage rates and harbour dues; and the 143rd section enacts, that in case of nonpayment of any money awarded by a justice as compensation for any materials or for any damage taken or committed by the trustees, or by any person acting under their authority, the same may be levied by distress of the goods of the treasurer of the trustees; and the section provides, that "it shall be lawful for such treasurer to retain out of any monies which he shall have received or shall receive under the authority of this Act, all such damages, costs, charges, and expenses as he shall have sustained or have incurred, by virtue of any such warrant as aforesaid." By the 120th section the trustees are exempted from all personal liability in respect of contracts entered into by them in that character. The third count is also defective in omitting to state any personal duty on the part of the trustees to keep the harbour clear. It does not allege, either, that they had funds for that purpose, or that they had notice that the harbour was in the condition which the plaintiff alleges to have been the cause of the injury. The act was not the *personal* act of the trustees. And, moreover, they have a discretion in the regulation of the harbour, and it is not the province of a jury to review that discretion. Their appointment is without emolument; and it would be a dangerous doctrine to hold, that trustees are personally liable for the act of an officer of theirs, where no improper conduct on their part was the cause of the injury. *Boulton v. Crowther* (a), and *Sutton v. Clarke* (b), were actions against trustees of turnpike roads for consequential injuries resulting from acts which had been done by their authority, and the trustees were

nected therewith; and lastly, in reducing and discharging the several principal sums of money which may have been borrowed under the authority or on the

credit of this Act, for the purposes of or connected with the said harbour."

(a) 2 B. & C. 703.

(b) 6 Taunt. 29.

held not to be liable. *Harris v. Baker* (a) was a similar action. Lord *Ellenborough*, C. J., there said: "It does not appear, by the Act of Parliament, that this action is maintainable against the trustees. The Act, indeed, empowers them to cause such number of lamps to be provided as they shall think necessary; but suppose they did not think it necessary to provide any lamps, can it be said that an action would lie against them upon that account? If, by omitting to put up lamps where it is necessary, they are guilty of a breach of public duty, they may be indicted for it. But to hold that every trustee of a road is liable in damages to such an accident as this, would, I conceive, be going further than any case warrants." [*Martin*, B.—Is it necessary to make such an allegation in the declaration: is it not rather a matter to be proved? The declaration alleges, that the defendants wrongfully and improperly left the rubbish in the harbour.] The declaration is not cured by such words, where the allegation of the facts upon which the duty is founded is altogether omitted. In *Ferguson v. Kinnoul* (b), which raised the question of the liability of the presbytery for the nonperformance of an act which they were bound to perform, Lord *Campbell*, C. J., in delivering his judgment, said (c), "Where the presbytery is acting judicially, or in any matter where its members have a discretion to exercise, no action could be maintained against them, at least without malice expressly charged and clearly proved." That case shews the necessity, not of the proof only, but of the *allegation* of the duty. *Harman v. Tapenden* (d) is to the same effect. In *Drewe v. Coulton* (e), it was held, that in an action against a returning officer, for refusing a vote at an election of members to serve in Parliament, malice must be proved as well as laid. The trustees are not liable for contracts entered into by

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(a) 4 M. & Sel. 27.

(b) 9 Cl. & F. 251.

(c) Page 312.

(d) 1 East, 555.

(e) Id. 563, note.

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themselves under the Act, nor are they responsible, in respect of the management of the harbour, for accidents of the description of which they are charged.

Quain contra.—The first two counts charge the trustees with negligence, and if they are guilty of it they are liable in damages. The defence suggested is open under the plea of not guilty. The harbour-master is alleged to be the defendants' servant, and it is consistent with every allegation that they gave personal directions as to mooring the vessel. [*Parke, B.*—The declaration charges them "as trustees;" if they acted as is now suggested, they acted in their personal capacity and not as trustees, and therefore they ought not to have been charged as such. We think that the two first counts are clearly bad, and that the defendants' liability depends on the third count.]

The third count is good. It contains an allegation that the defendants were guilty of negligence in allowing the accumulation of rubbish in the harbour. The question of negligence would be raised by the plea of the general issue. If the plaintiff should be unable to substantiate such allegations on the trial, he would fail. Persons acting in the capacity of these trustees are liable for injuries arising from acts done where they exceed their jurisdiction, and also in cases where, though acting within their jurisdiction, they are guilty of negligence. The fact that the trustees act without emolument does not affect their liability where they are guilty of negligence. In *The Grocers' Company v. Donne* (a), it was held, that in order to render commissioners, acting in the bonâ fide performance of a public duty, liable to an action for an injury to an individual, resulting from an act so done by them, it must appear that they have been guilty of negligence or want of skill in the conduct of it. The decisions in *Boulton v. Crowther* (b) and *Sutton v.*

(a) 3 Scott, 356.

(b) 2 B. & C. 703.

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Clarke (a), proceeded upon the ground that the defendants were acquitted of negligence. In the former of these cases, *Abbott*, C. J., in delivering his judgment, says, "The Act of Parliament, I think, authorised the trustees to do what they have done. If, in doing the act, they acted arbitrarily, *carelessly*, or oppressively, the law in my opinion has provided a remedy. But the fact of their having so acted is negatived by the finding of the jury." In *Jones v. Bird* (b), *Best*, J., said, "In *Sutton v. Clarke* the judgment proceeded on the ground that there was no pretence for imputing negligence to the defendants." *Jones v. Bird* is an authority that commissioners or trustees acting in a public capacity are responsible for injuries arising from negligence, though acting within their jurisdiction. And accordingly *Littledale*, J., in *Boulton v. Crowther*, said, "In *Jones v. Bird* the commissioners were held responsible for an act done by them in the discharge of their duty; but it was expressly found that they had acted carelessly and negligently." [*Parke*, B.—The objection is, that the declaration does not contain any allegation from which the duty to keep the harbour safe is to be inferred.] In *Par-naby v. The Lancaster Canal Company* (c) the declaration, which was in case, stated that by the Canal Act (32 Geo. 3, c. 101) the company was formed to make and maintain the canal, with power to take tolls; and all persons had free liberty to navigate the canal; and if any boat should be sunk in the canal, and the owner or person having care of it should not, without loss of time, weigh it up, it was by the statute to be lawful for the company to weigh it up and detain it till payment of expenses; that the company completed the canal and took tolls on it; that a boat sunk in the canal so that vessels passed with difficulty in the day, and at night were in danger of running foul of it; that

(a) 6 Taunt. 29 (b) 5 B. & Ald. 837. (c) 11 Ad. & E. 223.

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although the company could and ought to have requested the owner, &c. to weigh it up, and in the meantime to have caused a light or signal to be placed to enable boats to avoid it, yet the company did not cause the owner, &c. to weigh it up, nor themselves weigh it up, nor place a light or signal, whereby the plaintiffs' boat navigating the canal ran foul of the smaller boat and was damaged: and it was held by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the declaration disclosed a sufficient duty and breach. [*Parke, B.*—The defendants in that case were associated together in the undertaking for their private benefit and gain. In order to render these defendants liable for a non-feasance, the declaration ought surely to shew that they had the requisite funds.] That question is either involved in that of negligence, and is therefore open to the defendants under the plea of not guilty, or they ought to plead that they had no funds, for that is a matter entirely within their own knowledge, and of which the plaintiffs are wholly ignorant. Upon this point, *Sunderland Marine Insurance Company v. Kearney (a)* is in the defendants' favour. [*Parke, B.*—The defence there arose upon a proviso in the deed.] Executors are not liable as such except they have assets, and yet a declaration against them does not allege that they have assets. The principle upon which this question rests is to be found in the notes to *Pomfret v. Ricroft (b)*. If, therefore, the defendants admit by the pleadings that they have been guilty of negligence, they are responsible for its consequences, although they may be intrusted with a discretion in the exercise of their office under their Act, and although they act gratuitously. The rule is well laid down 1 Smith's L. C. 195, *n.*, that "the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it:

(a) 16 Q. B. 925.

(b) 1 Wms. Saund. 322 c, n. 3.

Brown v. Mallett (a) and *White v. Crisp* (b) are additional authorities on the subject.

Cowling was re-heard in reply to the cases cited, and he also cited *Chadwick v. Trower* (c) and *Reg. v. Norfolk Commissioners of Sewers* (d).

Cur. ad. vult.

The judgment of the Court was now delivered by

PARKE, B.—The question in this case is, whether the defendants, in their collective capacity of *trustees*, are liable on any of the counts upon general demurrer, the plea being bad.

The two first are framed on the supposition that the defendants as trustees had the control, guidance, and superintendence, or care, government, and direction of *all vessels* in the harbour, and were responsible for the neglect of the harbour-master or person employed by them which results in any damage to those vessels. This is not a correct view of their duties.

It is clear from the Act of Parliament, 3 & 4 Will. 4, c. cxiii, that no such duties are imposed on the trustees. They are a body named by the legislature in the first instance, afterwards in part by the lord of the manor of Ellenborough, in part elected from persons having a qualification by estate or the ownership of ships, and by persons having qualifications of a like nature. In these persons the legislature vests very large discretionary powers, considering, no doubt, that they will faithfully perform their duties, and requiring them to execute the powers and authorities reposed in them by virtue of the Act faithfully and irreproachably, according to the best of their judgment, and under the obligation of an oath.

(a) 5 C. B. 599.

(b) 10 Exch. 312.

(c) 6 Bing. N. C. 1.

(d) 15 Q. B. 549.

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The property in the harbour is vested in them for the purposes of the Act (sect. 4); they have power to elect a harbour-master (sect. 22), and temporary officers in his place (sect. 22), to make such bye-laws as to them shall seem expedient for the good government of the officers and servants connected with the harbour, and also in respect of the admission to, and the use and management of, the harbour, and all such bye-laws shall be sufficient in all Courts to justify persons acting under the same, but are subject to appeal.

By section 47 the harbour-master has power to direct where the ship entering the port is to be moored, and the person in charge of the vessel must obey.

It is clear that the trustees have no *personal* care or superintendence of the harbour, they are not to go to the harbour and personally to direct the arrangement of the shipping in it; and no action will lie against them personally or collectively if there is any defect in that respect. Their duty consists, as to the government of the port, in making bye-laws and appointing officers, for whose acts they are not responsible, because it is not their duty to perform those acts themselves, and therefore the maxim of "*respondeat superior*" does not apply.

It is also clear that no action will lie against them for making an improper bye-law. Their judgment is conclusive, and the remedy is by appeal.

The two first counts, therefore, of this declaration are unquestionably bad. The trustees are not liable for their harbour-master and servants appointed under the Act; and if it could be said (which we think could not be properly said) to be unnecessary to prove, under these counts, that the neglect was that of the harbour-master or servants, and that such statement was surplusage, the counts are not proved, for the defendants are not liable for their personal neglect in moving and managing vessels.

The third count is for neglect in the preservation and keep-

ing of the harbour, and improperly suffering and permitting coals and rubbish to accumulate therein contrary to their duty, whereby it became unsafe, and the plaintiffs' vessel being lawfully therein was thereby damaged.

We think this count is bad in substance, for the want of the allegation of facts on the record which would cast the duty of cleaning out the harbour on them, and also because their duties being described by the Act, they never could, as trustees under the Act, have such a duty imposed upon them; clearly they could not be bound to do so personally, or to pay for its being done out of their own pockets. The only possible ground of their liability could be that they had funds in their hands out of which they were *bound* by the Act to perform the duty of keeping the harbour clean and clear of obstruction.

Admitting, *argumenti causâ*, that they would be liable in that case, the count is clearly bad, for not stating the fact that they had funds which they were bound, at least *primâ facie*, so to apply.

The words "negligently and improperly" and "contrary to their duty," used in this count, cannot put the plaintiffs' case in a more favourable position than if the count had stated that it was, before the time of the damage, the duty of the trustees to have prevented coals and rubbish accumulating in the harbour, and at the time of it to have the harbour free from such accumulations and in a safe state. As that duty was not imposed by the statute, except in the event of their having funds which they were bound so to apply, the rules of special pleading require that the fact should be stated in the declaration. It is not enough to state that it was the duty of the defendants to do the act which they are stated to have neglected to do.

The rule is properly laid down by my Brother *Maule*, in *Brown v. Mallett* (a): "It is well established that such an

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avermment, namely, that it was the defendants' duty to do certain things, being mere matter of law, will not supply the want of those allegations of matter of fact from which the Court would infer the law to be as stated; such allegation (of duty) is useless where the declaration is insufficient, and superfluous where it is sufficient." Therefore, in that case, the Court disregarded the allegation of duty, holding that the facts stated of themselves raised the duty. So in *Parnaby v. Lancashire Canal Company* (a), the Court altogether disregarded the allegation of the duty, thinking the facts stated raised a different one. So in *Priestly v. Fowler* (b), the Court considered the allegation of duty as altogether insufficient, the declaration not stating facts from which duty could be inferred; so in *Chadwick v. Trower* (c); and in both these cases the Court gave judgment for the defendant for want of allegations of fact creating the obligation to perform the duty alleged.—See also *Seymour v. Maddox* (d).

But it is said, that the law has been relaxed, and that a general allegation of duty has been permitted in some cases; and why, it is asked, should it not be permitted in this? The cases relied upon are collected in a note in William's Saunders, 2nd Vol. 113 a. It will be found that these are all cases of a compendious statement of a right, where the plaintiff's action is founded on the possession of that right, and is for the violation of it, and possession of that right is *primâ facie* sufficient; or they are compendious statements of a duty arising from prescription or custom, which may indeed be considered as falling within the former class. Thus it is sufficient for the plaintiff to declare on his possession of a right of way, or a right of common, or other easement, by describing them and claiming them by reason of his possession of the land. His possession is enough, and

(a) 11 Ad. & E. 223.

(b) 3 M. & W. 1.

(c) 3 Bing. N. C. 334.

(d) 19 L. J., Q. B., 525.

it is unnecessary in an action for injury to it to describe whether it arises from grant or prescription. So in the case of an injury to a market or ferry. So of an injury in respect of the plaintiff's mill, who has a right to have the grain of others ground there by tenure, prescription, or custom; it is enough to state the plaintiff's possession and the defendant's obligation to grind, which is indeed part of the plaintiff's right, in a general form, as by reason of the possession of a house, or that all the inhabitants ought to grind there and the defendant is an inhabitant, which is a description of the right by tenure in one case and by custom in another.

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There is another class of cases in which an obligation is cast on the defendant; as for instance to repair a way to a close of the plaintiff over the defendant's land, to repair fences against the plaintiff's land, or to repair a wall adjoining to the plaintiff's house. In those cases it is enough to state in a general way the defendant's obligation by reason of the possession of his land or wall, or an equivalent averment. One reason given is, that in such cases a charge is laid upon the right of another, which, it may be, the plaintiff cannot particularly know: *Reg. v. Bucknall (a)*. All these cases, as well as the others before mentioned, may be considered to be descriptions in a compendious form of the plaintiff's right to the enjoyment of a wall or fence or a way repairable by the defendant, in a form of action in which the possession of a right is sufficient to give a right of action.

None of these apply to the present case, in which, on the assumption that the defendants are bound if they have sufficient funds, there is no allegation whatever that they had such funds; and if particularity of averment as to the amount of those funds may be excused by reason of the exact amount of the monies receivable and the expenditure not lying within the plaintiffs' knowledge, that is no rea-

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son why all averment of a condition precedent should be dispensed with; and it may be observed that the plaintiffs would have no great difficulty in obtaining general evidence of the amount of the receipts and making a *prima facie* case.

The utmost the cases relied upon from 2 Saund. 113 b shew, is that an allegation that the defendants ought to have kept the port clear by reason of their possession of funds sufficient for and which ought to have been applied to that purpose, might have been enough.

But in the next place, we are clearly of opinion, that if the trustees had received funds sufficient for that purpose from the different sources mentioned in the Act, no action would lie against them for not cleansing the port, or suffering rubbish to accumulate there; for the legislature reposes in them an absolute discretion (with certain exceptions) to dispose of the funds arising from the tolls on shipping in maintaining the harbour. Thus, by section 4, by which the right and property in the harbour, wharfs, buoys, &c., and also in the lands and tenements, funds, chattels, and effects of the old trustees, all are vested in them for the purposes of the Act, the trustees have power to sell as they think proper, and the money arising from such sale is to be applied in aid of *such* of the *purposes* of the Act connected with the harbour as the trustees *shall think proper*. Then by section 140 the monies arising from the tonnage rates, and which may be borrowed on the security of those rates, and all other monies which may arise or be received by virtue of the acts connected with the harbour, must be applied in a certain order: first, to the expenses of obtaining the Act, so far as relates to the harbour, with interest on money advanced for that purpose, as they shall direct; next, in discharging the annual interest of money borrowed for the purposes of or connected with the harbour; and in the next place in paying and discharging all other costs, charges, and expenses attending the carrying into execution the several

purposes of the Act connected with or relating to the said harbour and the other works belonging thereto or *connected therewith*; and next in reducing the principal sums borrowed on the credit of that Act for the purposes of the harbour.

Now, is it possible to doubt that the trustees have a discretion to order the application of all the funds (after the interest is paid, and with the exception of one toll or duty which is specially provided for by section 36 hereinafter mentioned) as they or the majority in their judgment think fit; and therefore that they may direct what repairs are to be made in the harbour, what (if any) additional new works made, what jetties to be constructed, what machinery to be provided; and to determine, according to their best judgment, which of them is to have priority?

If they have a surplus in their hands, after paying interest on the loans, may they not, although the harbour wants cleansing, apply that surplus to the repairs of the piers, to purchase windlasses, to provide buoys, to make another jetty, to deepen the mouth of the harbour, if they think these objects are more pressing and of more advantage to the harbour than keeping the bottom of it clean; and can this discretionary power, which is confided to them as trustworthy persons by Parliament, be subject to the control of the opinion of a common jury, who may overrule their decisions in an action against them, if they think they have acted with wrong judgment, and render them liable to pay costs? We think such a proposition is perfectly untenable. There appears to be one case only in which they are bound to apply a particular sum to a particular object.

For these reasons we are of opinion that the third count, as well as the others, is bad in substance, and that our judgment should be for the defendants.

Judgment for the defendants.

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By a settlement made in 1840, S., in contemplation of his marriage, conveyed certain real estates to trustees to his own use until the marriage, and after the marriage to the trustees, their executors, administrators, and assigns, for the term of 500 years, without impeachment of waste,

upon certain trusts, and immediately after the expiration or sooner determination thereof, and in the meantime subject thereto, to the use of S. for life, without impeachment of waste, with remainder to certain other uses. It was also provided by the deed, that it should be lawful for S., during his life, from time to time, by deed either referring to or not referring to the power, to demise the said real estate for any term not exceeding twenty-one years, so that there should be reserved the best or most improved yearly rent, to be incident to the immediate reversion of the hereditaments so demised, that could be obtained for the same, and so that the lessee was not by any clause or words therein to be contained made punishable for waste, or exempted from punishment for committing waste. The marriage took place, and S. afterwards, by deed, leased the premises to the defendant for twelve years. By the lease, which did not refer to the deed of settlement, the rent was reserved to S., his heirs and assigns; and it contained a covenant by the lessee to repair a blacksmith's shop, and all the glass and leadwork of the windows of the messuages, and all doors &c., the lessee being allowed sufficient bricks, &c., for the repairs, and to yield up the premises so repaired at the end of the term to S., his heirs or assigns: there was also a covenant by S. that he would repair all the messuages, houses, outhouses, edifices, and buildings, except in respect of repairs thereinbefore covenanted to be done by the defendant. S. died before the expiration of the term. In an action by the trustees against the lessee for a breach of the covenants of the lease, in not repairing the premises,

Held, that the lease was not in pursuance of the power, and void as between the trustees and the lessee: first, because the condition as to the rent being reserved incident to the immediate reversion was not performed, for the rent was made payable to "S., his heirs and assigns," and S. had no legal reversion: secondly, because the lease contained an implied exemption from punishment for permissive waste.

Such a lease is good by way of estoppel between the parties to it, and consequently S. might have maintained an action upon it against the lessees for a breach of covenant by them.

The declaration recited the deed creating the power, the lease and the entry of the lessee under the demise, and that he occupied and enjoyed the premises under the lease to the expiration of the term, and alleged as a breach, the leaving the premises out of repair at the end of the term.

Held, that, although the defendant did not by his pleadings deny that he had occupied the premises, yet, that, inasmuch as the declaration was framed substantially upon the lease, the action failed.

heirs, in their actual possession then being, by virtue of a bargain and sale, &c., the manors and advowsons of Barsham and Shipmeadow, and divers messuages, farms, lands, tenements, and hereditaments, including a certain messuage or farm-house called Barsham Hall, and certain cottages, blacksmith's shop, edifices, buildings, barns, stables, yards, gardens, orchards, lands, meadows, pastures, marshes, aldercars, feedings, and appurtenances comprised in and demised by a certain lease thereafter mentioned: To have and to hold the said manors, advowsons, messuages, farms, lands, tenements and hereditaments, unto the said R. R. Bayley, the plaintiff, W. Gwyn, and I. Preston and their heirs, to the use of the said R. A. Suckling, his heirs and assigns, until the solemnization of the said intended marriage; and from and immediately after the solemnization thereof, to the uses, upon and for the trusts &c. thereafter contained, that is to say, to the use of the said R. R. Bayley and the plaintiff, their executors, administrators, and assigns, for the term of 500 years, to commence from the day of the solemnization of the said intended marriage, without impeachment of waste, upon certain trusts in the said indenture of release mentioned, and which are still unperformed, and which term of 500 years is still in existence and unsatisfied; and immediately from and after the expiration or other sooner determination of the said term of 500 years, and in the meantime subject thereto and to the trusts thereof, to the use of the said R. A. Suckling and his assigns, for and during the term of his natural life, without impeachment of waste, with remainder to certain uses in the said indenture of release particularly mentioned and set forth. And by the said indenture it was provided, and it was thereby further agreed and declared, that, as regarded the said manors or lordships, advowsons, messuages, and other hereditaments thereby released or otherwise assured or intended so to be, it should be lawful for the said R. A. Suckling

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during his life, from time to time and at all times, by any deed or deeds, instrument or instruments in writing, either referring to or not referring to the said power, to be sealed and delivered by him in the presence of and attested by two or more credible witnesses, to demise and lease, or limit or appoint by way of demise or lease, all or any part of the said manors and other hereditaments thereby released, or otherwise assured or intended so to be respectively, with their respective rights, members, and appurtenances, to any person or persons for any term or number of years absolute, not exceeding twenty-one years, to take effect in possession and not in reversion or by way of future interest, so as that there be reserved in every such demise or lease, or limitation or appointment by way of demise or lease (as the case might be), payable during the estate or use thereby created, the best or most improved yearly rent or rents, to be incident to the immediate reversion of the hereditaments so to be demised or leased, or limited or appointed by way of demise or lease, that could or might be reasonably obtained for the same without taking any fine, premium, or benefit for the making thereof; and so as that there be therein respectively contained a clause in the nature of a condition of re-entry for nonpayment of the rent or rents thereby to be respectively reserved, in case the same should remain unpaid for any space not exceeding thirty days, and so that the person or persons named therein as lessee or lessees did execute a counterpart or counterparts thereof respectively, and did thereby covenant for the due payment of the rent or rents thereby to be respectively reserved, and were not by any clause or words therein to be contained to be made punishable for waste or exempted from punishment for committing waste, anything therein before contained to the contrary thereof in anywise notwithstanding—The declaration then averred, that afterwards, and before the making of the lease thereafter mentioned, the said marriage between the said R. A. Suckling

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and A. M. Yellowly was duly had and solemnized according to law; and that afterwards, by a certain indenture of lease, dated and made on the 11th of October, A. D. 1840, between the said R. A. Suckling of the one part, and the defendants of the other part, in pursuance of and according to the terms and true intent and meaning of the said power, but not referring thereto; and which lease was sealed and delivered by the said R. A. Suckling, in the presence of and attested by two credible witnesses, and a counterpart whereof was executed by the defendants, the said R. A. Suckling demised to the defendants the said messuage or farm-house called Barsham Hall, and the said cottages, blacksmith's shop, &c., to have and to hold the said messuage, farm, &c., and premises thereinbefore described unto the defendants, their executors, administrators, and assigns, from the 11th day of October, 1840, for and during and unto the full end and term of twelve years thence next ensuing; and the defendants did thereby covenant with the said R. A. Suckling, his heirs, and assigns (amongst other things), that they the defendants would, at their own costs and charges, from time to time during the continuance of the said demise, maintain and keep in good repair and condition, and in such repair and condition should, at the expiration of the said term, leave the said blacksmith's shop, all the glass and leadwork of the windows of the said messuages and cottages, the boxes, suckers, and going gears of the pump, and all the doors, locks, keys, bolts, bars, hooks, eyes, staples, hinges, iron-work, benches, battens, shelves, gates, gate irons, stiles, lifts, posts, hobs, rails, fences, bridges, ditches, drains, rhines, watercourses, and marsh-walls of or belonging to the said hereditaments and premises, the defendants being allowed sufficient bricks, tiles, lime, timber, and wood for the repairs of the said buildings, and rough wood, bushes, and thorns only for the other repairs, and also that they the defendants should and would, yearly and

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every year during the said demise, cut and scour 100 rods, at least, of the ditches, banks, and fences belonging to the said arable land thereby demised, where the same should be most wanted, and should make such ditches so to be cut and scoured as aforesaid, of the following dimensions, &c., and would lay all the earth arising from such ditches upon the banks, rounded and trimmed in a husbandlike manner, for the improvement of the fences, and would lay a sufficient stock of good whitethorn sprig into such fences where most wanted, and also would mould up and preserve all such fences and banks, and all timbers and timber-like trees growing upon such fences; and also would, yearly and every year during the said demise, well and sufficiently cut the sides, and draw, scour, drain, and cleanse from weeds and rubbish all the marsh, drains, ditches, and watercourses whatsoever belonging to the said thereby demised hereditaments and premises in a husbandlike manner, and once at least during the said term well and sufficiently bottomfy the same drains, ditches, and watercourses; and the said demised hereditaments and premises so repaired, drained, and amended in all respects as aforesaid should and would leave and yield up unto the said R. A. Suckling, his heirs or assigns at the end, expiration, or other sooner determination of the said demise; and also that the defendants should and would at all times during the said demise use and manage all the arable and pasture lands thereby demised in a husbandlike manner. — Averments: that, under and by virtue of which said demise, the defendants entered into and upon the said demised premises, and became and were possessed thereof for the term so to them thereof granted as aforesaid: that afterwards, and before the expiration of the said term of twelve years, to wit, on the 4th day of November, A. D. 1851, the said R. A. Suckling died, and the immediate reversion of and in the said demised hereditaments and premises expectant on the determination of the said term of twelve years was then

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vested in and belonged to the said R. R. Bayley and the plaintiff, and continued so vested until the death of the said R. R. Bayley, which took place in March, A. D., 1852; and the immediate reversion of and in the said demised hereditaments and premises then became vested in and belonged to the plaintiff, and continued so vested until the expiration of the said term of twelve years; and further, that the defendants held, occupied, and enjoyed the said hereditaments and premises under and by virtue of the said lease until the expiration thereof, and were tenants of the said hereditaments and premises after the death of the said R. A. Suckling, and thence until the death of the said R. R. Bayley, to the said R. R. Bayley and the plaintiff, and since the death of the said R. R. Bayley unto the end of the said lease, to the plaintiff, upon and subject to the terms, covenants, agreements, and conditions in the said lease contained, and were legally bound and liable, after the death of the said R. A. Suckling until the death of the said R. R. Bayley, to the said R. R. Bayley and the plaintiff, and since the death of the said R. R. Bayley to the end of the said lease, to the plaintiff, to observe and keep the covenants and agreements in the said lease contained on the defendants' part to be observed and kept.—Breaches: that although the said R. R. Bayley, and the plaintiff since the death of the said R. R. Bayley, did all things necessary on their and his part respectively to be done to entitle them and him respectively to have the said last-mentioned covenants and agreements observed and kept by the defendants, yet the defendants did not, nor did either of them after the death of the said R. A. Suckling from time to time during the continuance of the said demise, maintain or keep in good repair or condition, nor did they or either of them in such good repair or condition, at the determination of the said term, leave the said shops, &c., or any or either of them, or any part thereof, but the same respectively were, after the death of the said R. A. Suckling and during the residue of the said demise, and

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were left at the end thereof out of repair and very ruinous and in great decay, although the defendants were allowed sufficient bricks, &c. for the repairs ; nor did the defendants, after the death of the said R. A. Suckling, yearly, and every year during the residue of the said demise, cut and scour 100 rods of the ditches, fence, &c., or mould up and preserve such fences and banks, and timbers and timberlike trees growing upon such fences, or any or either of them ; nor did the defendants, or either of them, after the death of the said R. A. Suckling, yearly, and every year during the residue of the said demise, well and sufficiently cut the sides, and draw, scour, drain, and cleanse from weeds and rubbish the marsh, drains, ditches, and watercourses, &c. ; nor did the defendants leave the said demised hereditaments and premises, or any of them or any part thereof, at the end of the said term of twelve years granted by the said lease, so repaired, drained, or amended in any respect as, according to the said lease and the said covenants therein contained, the same ought respectively to have been left ; nor did the defendants, after the death of the said R. A. Suckling, during the residue of the said demise, use and manage the arable lands demised by the said lease in a husbandlike manner ; but the same were, during all the said residue of the said lease and at the end of the said term of twelve years thereby granted, very foul, weedy, and covered and choked up with weeds, &c., for want of the proper and husbandlike cultivation thereof.

The defendant James Gower the elder pleaded by setting out the lease of the 11th of October, 1840, verbatim. The only material parts of the lease, in addition to those facts which appear from the declaration, are, that there were reservations to R. A. Suckling (the lessor), his heirs and assigns, comprising sufficient rough wood, bushes, and thorns for the necessary repairs of the gates, posts, and fences belonging to the said demised premises, to be taken by the appointment of the said R. A. Suckling, his heirs

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and assigns, and also, excepting unto the said R. A. Suckling, his heirs or assigns, agents, servants, and workmen, free liberty of ingress, egress, and regress, &c., to cut down, convert, and view the said timber, and also, excepting unto the said R. A. Suckling, his heirs and assigns, the right of killing game upon the said lands and hereditaments, and for him and them and his and their gamekeepers, friends, and servants, and all and every other person and persons having his or their appointment or permission, full and free liberty of hunting, fowling, fishing, hawking, coursing, and killing game in and upon the demised premises. The rent of 500*l.* was reserved to the said R. A. Suckling, his heirs and assigns, and also, over and above the same, the further yearly rent of 10*l.* for every acre of the meadow, marsh, or pasture land thereby demised, which the defendants or either of them should at any time during the demise break up or convert into tillage, and the further yearly rent of 10*l.* for every acre of arable land which the defendants should plough, sow, or crop out of course or contrary to the covenants thereafter contained. The lease contained a power to the said R. A. Suckling, his heirs and assigns, in the event of the defendants' underletting without the license or consent in writing of the said R. A. Suckling, his heirs or assigns, for that purpose had and obtained, or for breach of any covenant, to re-enter, and that, immediately after such re-entry made, the term thereby granted should cease and determine. Then followed covenants by the defendants with R. A. Suckling, his heirs and assigns, for payment of the rent to him, his heirs or assigns, of taxes, assessments, and impositions, and especially rent-charges in lieu of tithes, and a covenant of indemnity from actions in respect thereof; also covenants to convey materials for repairs from any place or places the said R. A. Suckling, his heirs or assigns, should direct, and to provide proper and convenient rooms in the said messuage for holding the courts for the manors of Barsham Hall and Shipmeadow,

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and stable room for the horses of the stewards and tenants of the said manors. The defendants covenanted to repair ditches, bridges, and works in such situation, manner, and form as should be from time to time described and determined by the agent or surveyor of the said R. A. Suckling, or by such other competent person as he, his heirs or assigns, should from time to time appoint, and also to lay out yearly during the first five years of the said term in improvements, drainage, and repairs, the sum of 50*l.* on being paid or allowed by the said R. A. Suckling, his heirs and assigns, out of the rent thereby reserved the sum of 50*l.* yearly, and to yield up the demised premises in repair unto the said R. A. Suckling, his heirs or assigns, at the end, expiration, or other sooner determination of the said lease. The defendants also covenanted not to convert into tillage any part of the meadow, marsh, or old pasture land without the consent in writing of the said R. A. Suckling, his heirs or assigns, first obtained, and that they the defendants would during the term, at the request of the said R. A. Suckling, his heirs or assigns, warn off from the said demised hereditaments and premises all persons hunting, coursing, shooting, fishing, or fowling thereon. The said R. A. Suckling, for himself, his heirs, executors, and administrators, covenanted with the defendants that he the said R. A. Suckling, his heirs and assigns, should and would during the said term maintain and keep all the said messuages, and all and singular the houses, outhouses, edifices, and buildings, and the mill for draining the said marshes, in good and tenantable repair, except in respect of such repairs and amendments thereinbefore covenanted to be done by the defendants, their executors, administrators, and assigns.

Demurrer and joinder.

The defendant James Gower the younger pleaded, secondly,—That the rent reserved by the said indenture of lease was not so reserved as in the declaration is stated to have been required in and by the said indenture of release

for a due execution of the said power, but was in and by the said indenture of release reserved in manner following, that is to say, to the said R. A. Suckling, his heirs or assigns, and not otherwise; and that from the time of the solemnization of the said marriage until and at the time of the making of the said indenture of lease, and thence until and at the death of the said R. A. Suckling, the said R. R. Bayley and the plaintiff continued to be and were possessed of the said estate for 500 years so to them limited as in the declaration mentioned; so that the said indenture of lease was not a lease according to the said power, and so was not a lease which continued after the death of the said R. A. Suckling as in the declaration supposed, but was a grant of the said remainder which was limited to the said R. A. Suckling for his life as in the declaration mentioned, and so was a grant which determined on the death of the said R. A. Suckling; and that the said indenture of lease was and is in the words of the lease set out by the other defendant in his plea.

Thirdly—That the defendants were by certain words mentioned in the said indenture made dispunishable for certain waste, and so the said indenture of lease was not a lease according to the said power, and so was not a lease which continued after the death of the said R. A. Suckling as in the declaration supposed, but was a grant of the said remainder so to the said R. A. Suckling limited for his life as in the declaration mentioned, and so was a grant which determined on the death of the said R. A. Suckling; and that the said indenture of lease was and is in the words of the lease set out by the other defendant in his plea.

Demurrer to both pleas, and joinders therein.

The case was argued last Term (April 23 and 25) by

Worlledge in support of the demurrers.—The defendants by their pleas raise two objections to the plaintiff's right to

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maintain this action. First, they will contend that the reservation of the rent being to the lessor, his heirs, and assigns, is not warranted by the power in the deed of settlement; and secondly, that the clause in the lease, by which the tenants are dispunishable for waste, is a breach of the condition of the power, and consequently the lease is void as between these parties. The plaintiff, however, contends, that even assuming that the lease itself cannot be supported, yet inasmuch as the declaration contains an allegation that the defendants occupied, held, and enjoyed the demised premises during the term, and such allegation is not traversed, this action is maintainable.

First, as to the objection that the rent is reserved to the lessor, his heirs, and assigns, and consequently that the lease is not in accordance with the power. Now, according to the principle in *Whitlock's case* (a), a lease in execution of a power by a legal tenant for life in possession with remainders over, has its essence, not in the estate of the tenant for life, but in the estate out of which it was carved, and in construction of law precedes the estate for life and all the remainders. And this doctrine has been acted upon in several cases. In *Greenaway v. Hart* (b) the lessor had merely an equitable title, and the right of re-entry was reserved to him and his assigns. The Court there held, that the word "assigns" was referable to the assigns of the settlor. *Cresswell, J.*, in delivering the judgment of the Court, after referring to *Whitlock's case* and the other authorities upon the subject, said, "By these cases it may be taken as established, that if a person seised in fee settle his estate on himself for life, with remainders to other persons, reserving a leasing power which he afterwards exercises, reserving rent to himself, his heirs and assigns, those in remainder shall have the rent. So also, where a person seised in fee settles his estate on A. for life with remainders, and gives

(a) 8 Rep. 69 b.

(b) 14 C. B. 340.

him a leasing power which he exercises, reserving rent during the term to himself, his heirs and assigns, the remainderman shall take it, although neither heir nor assign of A.,—according to some authorities, because the reservation of rent during the term would give it to him, and that which follows shall not prejudice; according to others, because *assigns* shall be construed assigns of the party creating the power, out of whose estate the term is supposed to emanate." Here, Suckling being the settlor and the creator of the term of 500 years, the plaintiff, in whom that term now vests by survivorship, is his assignee. The moment the power was executed, the lease interposed. The case is the same as if the lease had been created by the deed of settlement, for where a lease is made under a power it takes precedence of all the existing limitations to the extent of the interest created by the power: *Whitlock's case*. In *Berry v. White* (a) Sir O. Bridgman, in delivering his judgment, says, "Another reason may be given why this reservation to Sir Robert, his heirs and assigns, during the term may be good is, the words 'his heirs and assigns' do not denote any person certain, as if he had reserved it to his wife or daughter, or the like, but properly intend only the duration of the estate or the rent—that is, for ever, so long as the estate lasts." That is an authority that such words as militate against the doctrine referred to may be rejected as surplusage. In *Rogers v. Humphreys* (b), where a power was reserved to E. R. to demise premises for ten years from the date of the deed, or seven years from the day of her decease, reserving the best rent &c. E. R. demised the premises to a tenant for seven years from the day of her decease, reserving rent to "M. R., or the person for the time being entitled to the freehold or inheritance of the premises immediately expectant" on the decease of E. R.: the lessee entered, and it was held, that the trustees of a

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(a) *Bridg., O.*, 82.

(b) 4 *Ad. & E.* 299.

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term of 1000 years, though not entitled to the freehold or inheritance," were the reversioners entitled to the rent reserved by the lease. Lord *Denman*, C. J., in delivering the judgment of the Court, said, "This case differs from all the cases cited, for here the lease is neither prior to the mortgage nor subsequent to it; but it is in point of law contemporaneous with it, for the lease is not in fact made till September, 1831, nearly a year after the mortgage; yet as the lease is made under a power, it is referable to the instrument creating the power, and is derived out of it, and has the same effect as if it had been made under the instrument itself." In *Doe d. Rogers v. Rogers* (a), the same lease came under the consideration of the Court. In 2 Sugd. on Powers, 452, 6th edit., it is laid down, that "It is well established that a reversion to the tenant for life exercising the power, 'his heirs and assigns' is a good reservation; for those words mean of necessity the person to whom the inheritance shall go: the words can have no other meaning." [*Martin*, B., referred to 2 Wms. Sand. 369 and 371, notes (4), (5).]

Secondly, it is said that the lease is void by reason of the tenants being dispunishable for waste. It does not appear from the pleadings that the best rent was not reserved. In order to render the lease void, it should have contained an express permission to the tenants to commit waste. The lease cannot be held void by mere implication: *Doe d. Bromley v. Bettison* (b) is directly in the plaintiff's favour. There, under a power to lease for twenty-one years, *reserving the best rent*, so as the lease should not contain any clause whereby authority should be given to the lessee to commit waste, or whereby he should be exempted from punishment for committing waste, and so as such lease should contain such other conditions, covenants, and restrictions as were generally inserted according to the usage of

(a) 5 B. & Ad. 755.

(b) 12 East, 305.

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the counties where the premises were, it was held that a lease was good, though the lessor thereby took the repairs of the mansion house (excepting the glass windows) on himself, and covenanted that if he did not repair it within three weeks after notice, the tenant might, and deduct the charges out of the rent reserved to the lessor; and though the lessor covenanted, in consideration of a large sum to be laid out by the lessee in the repair of the premises in the first instance, to renew during his (the lessor's) life at the request of the lessee, his executors, &c., on the same terms, because this covenant only bound the lessor himself, and if the best rent were not reserved upon such renewal, the lease would be void against the remainderman. *Doe d. Hopkinson v. Ferrand* (a) and *Doe d. Egremont v. Stevens* (b) are additional authorities that the clause objected to cannot by implication be construed as permitting the tenant to commit waste.

Thirdly, assuming the lease to be void, the plaintiff is entitled to recover upon these pleadings, as the declaration contains an allegation which is not denied, and which therefore is admitted, that the defendants occupied and enjoyed the premises during the term. The lease must be looked at simply for the purpose of ascertaining the terms upon which the defendants occupied: *Beale v. Sanders* (c).

Gray contra.—The party reserving the rent to himself and his assigns, instead of to the persons seised of the legal estate, has not acted in accordance with the power. No doubt, where the donee of a power, being tenant for life of the legal estate, in pursuance of the power grants leases for life, reserving rent to himself and his assigns, such is a good execution of the power, because he has himself the immediate reversion. The effect of the authorities relied on is,

(a) 20 L. J., C. P., 202.

(b) 6 Q. B. 206.

(c) 3 Bing. N. C. 850.

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that the word "assigns," in such cases, means the parties who would be entitled to the legal estate on the determination of the lease created by the power, not the persons to whom the donee of the power may assign the lease. In *Greenaway v. Hart*, the question was as to a right of re-entry, and the whole of the facts and the title of the lessors appeared on the face of the lease. *Cresswell, J.*, there said: "The point to be determined is, whether the plaintiffs, as assigns of the reversion, can take advantage of the proviso for re-entry? For the defendants, it was contended that they could not; for that the lessors, Thomas Triquel and Thomas Fasson, having only an equitable estate, must be considered as strangers, and that no right of re-entry can be reserved to a stranger; for which *Doe d. Barker v. Goldsmith (a)* was cited as an authority on that point, and also that no question of estoppel arises in this case, inasmuch as the title of the lessors was disclosed by the lease." *Rogers v. Humphreys* is no authority upon the point, as there the rent was properly reserved, although the language used was inaccurate. The deeds of lease and release set out the power; and the Court held that the words, though not accurate, were clearly intended to give the rent to the party next in reversion. There also the whole matter appeared on the face of the lease. It does not appear from this lease that it was intended to operate under the power. The lessor had no legal reversion. It could never have been intended by the parties to the deed of settlement that he should receive the rents, for the trustees might have immediate occasion to raise monies for the purposes of the trust. The lessor's estate is also subsequent to the term of 500 years. The execution of the power could not in any way interfere with the due execution of the trusts. As between the parties themselves to the lease, it might operate by way of estoppel; but that argument cannot apply

(a) 2 C. & J. 874.

to an action by the trustees. The lease, therefore, is not in pursuance of the power, which requires the rent to be reserved incident to the immediate reversion, and Suckling had no title to it.

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Secondly, as to the question of waste.—The covenants in the lease refer both to permissive and to commissive waste. There is no reason why full meaning should not be given to the words used; and if so, the reversioner would have no remedy against the tenant for leaving the premises unrepaired and in a ruinous condition. The donee of the power has no authority to shift the burden of repairing the premises from the tenant upon those in remainder. *Doe d. Bromley v. Bettison* was decided on the ground that no authority was given to the lessee to commit waste. In *Doe d. Hopkinson v. Ferrand*, the deed giving the power was recited in the lease; and the Court held that it was not a contravention of the power.

Lastly, the declaration may be read as stating a tenancy upon the terms of the lease; for, it alleges that the defendants "held under and by virtue of the said lease, until the expiration thereof," and that they were legally bound to observe and keep the covenants in the said lease contained; and the breach complains of the defendants breaking their covenants during the residue of "the said demise." The declaration is founded upon a holding during the term created by the lease, and that is not denied. [*Parke, B.*—It is clear that the declaration alleges a holding under the lease only.]

Worlledge, in reply, cited *Doe d. Devenish v. Moffatt* (a) and *Tress v. Savage* (b).

Cur. adv. vult.

(a) 15 Q. B. 257.

(b) 4 E. & B. 36.

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The judgment of the Court was now delivered by

PARKE, B.—[His Lordship stated the pleadings, and proceeded]: The first question which arises upon these pleadings is, whether the lease to the defendants was made according to the power of leasing given by the settlement of the 20th April, 1840. If it was not, then the lessee could not be considered as deriving his estate out of that created under the settlement, as he would do if the lease was made pursuant to the power, according to the principle of *Whitlock's case* (a), acted upon in the case of *Berry v. White* (b), and *Isherwood v. Oldknow* (c), and recently in that of *Greenaway v. Hart* (d).

In the argument before us two conditions, essential to the due execution of the power, were contended not to have been complied with. The power is for Alfred Suckling, the tenant for life in remainder after the term of 500 years, by any deed or instrument in writing referring or not referring to the power, to be sealed and delivered in the presence of and attested by two credible witnesses, to limit and appoint by way of demise, and lease, any part of the lands to any person for any term of years, to take effect in possession, so that there be reserved in every such demise or lease, or limitation by way of demise or lease, &c., *payable during the estate*, or use thereby created, the best yearly rent, to be incident to the *immediate reversion* of the hereditaments so to be demised or leased, or limited or appointed, &c., and so that the lessees were not by any clause or words therein contained made *dispunishable* for waste, or exempted from punishment for *committing waste*.

It was contended, first, that the condition, as to the reservation of rent being reserved incident to the immediate reversion, was not performed, because in the lease it was made

(a) 8 Coke 69 b.

(c) 3 M. & S. 382.

(b) Sir O. Bridgman's Judgment, 82.

(d) 14 C. B. 340.

payable to Alfred Suckling, the lessor, his heirs and assigns; and Alfred Suckling, the lessor, had no legal estate in possession, and consequently no legal reversion, but simply a legal estate in remainder, after the determination of the term of 500 years vested in the trustees.

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Secondly, it was contended that the condition, as to the lessees not being made dispunishable for waste by any clause or words therein contained, was violated by this lease; and consequently, that the lease never had any operation at all under the appointment, and was only a lease good by estoppel, of which the lessor, his heirs or assigns, only could take advantage, and the plaintiff who claimed under the settlement could not.

As to the first objection, whether the reservation of the rent to the lessor, his heirs and assigns, would be bad in this case, is a question of some nicety. We think that it is bad.

There is no doubt that, if the lessor was legal tenant for life in possession, with remainders over to other persons, and had a power of leasing, a demise by him according to the power, reserving rent to the lessor, his heirs and assigns, or in any other terms, shewing the intention of the parties that the rent should have continuance after the death of the lessor, would give the title to sue to the lessor during his life, and to the remaindermen in the settlement, under which the tenant for life had his estate; for the lease according to *Whitlock's case* had its essence, not in the estate of the tenant for life, but in the estate out of which it was carved, and in construction of law precedes the estate for life, and all the remainders. But, where the donee of the power has not any estate at all, and reserves rent payable to himself, though the lease takes its effect from the settlement, the reservation of rent to the lessor is not a reservation of rent to be incident to the immediate reversion of the hereditaments demised, and so not according to the power.

In this case, upon the due execution of the power by a proper lease, the estate of the lessee would take effect out

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of the term of 500 years, and the estate would stand limited after the marriage to the trustees of the term, for so many years of it as elapsed to the date of the lease, then to the lessee for his twelve years term, in the nature of a sublease, then to the trustees for the residue of the 500 years, remainder to the lessor for life. The lessor would have no right to the rent on such a lease, unless by implication the settlement, by giving him a leasing power, gave him a reversion during the currency of the lease, which could not be without taking it from the term of 500 years, which would break the term into two parts, and so defeat the intention of the settlement, which was to give the trustees the entire term, in order to enable them to perform the trusts for which it was created; such an implication, therefore, cannot be made in this case.

If, however, the leasing power had been recited in the lease, the lease would, on the face of it, shew that it was meant to be according to the power; and to make it so that the reservation of the rent to *the lessor* might be rejected as surplusage; the *reddendum* during the term being sufficient to make the rent payable to the parties entitled to the reversion. In such a case the condition, that the rent should be reserved so as to be incident to the reversion, would be performed. On this principle the case of *Greenaway v. Hart* (a), where the lease recited the power, was decided (b).

In the present case the lease does not recite the power, and so the language of the lease cannot be modified by the context, as was done in that case; nor indeed is it stated in the pleadings, that it was intended *by both parties* to be in pursuance of and according to the power. Even if it were, there would be a very great, and as we think insurmountable, difficulty in allowing the express terms of the lease to be varied by parol evidence of the intention of the parties; but if such were not the intention, how can they be varied against the lessee, who has covenanted to pay the rent to

(a) 14 C. B. 340.

(b) See page 354.

the lessor, and knows nothing of any other person who could be entitled to receive it; and how can a different contract be put upon him against his consent? In the case where the power is recited, the lessee, who is presumed to know the law, knows that the reservation to the lessor is idle and superfluous. It is not so where the lessee knows nothing but what the lease itself imports. We therefore think that the lease is void, as not being a due execution of the power as to the reservation of the rent.

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Then, as to the second objection, the first point to be considered is, what is the meaning of the condition as to waste.

It is not expressed with accuracy. The multiplication of words renders it to some extent obscure. The condition is, that the lessee should not by any clause or words contained in the lease be punishable for waste, *or* exempted from punishment for committing waste. If it had been provided that the lessee should not by any clause or words be *expressly* made punishable for waste, no question could have arisen, for there is no *express* stipulation that the tenant may *commit* waste, or *permit* it.

But there is an implied permission in the lease, to leave the repairs of the houses and mill undone, as the lessor covenants to do them; and it follows, that the lessee is not to do them. A doubt has been stated indeed in a note to 2 Saund. 252 b., whether a tenant for years is liable for permissive waste, and if he were not, then a covenant by the landlord to repair would not amount to an implied permission to the tenant to omit to repair. These doubts arise from three cases in the Common Pleas: *Gibson v. Wells* (a), *Herne v. Benbow* (b), *Jones v. Hill* (c). Upon examining these cases, none of which appears to be well reported, the Court seems to have contemplated the case only of a tenant at will in the two first cases, and in the last no such propo-

(a) 1 N. R. 290.

(b) 4 Taunt. 764.

(c) 7 Taunt. 392.

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sition is stated, that a tenant for years is not liable for permissive waste. We conceive that there is no doubt of the liability of tenants for terms of years, for they are clearly put on the same footing as tenants for life, both as to voluntary and permissive waste by Lord Coke, 1 Inst. 53, *Harnet v. Maitland* (a), though the degree of repairs required for a *tenant from year to year*, by modern decisions, is much limited (b). This being so, the covenant by the lessor to do the repairs implies an exemption of the lessee.

The only remaining question is, what is the meaning of the words "to be exempted from punishment for committing waste."

The former words alone, viz. that the lessee should not be punishable for waste, would include both permissive and commissive waste; why are the other words added? Are they by way of explanation of the former, and to confine them to commissive waste, or are they mere surplusage?

We think they are merely superfluous, and that the donee of the power was meant to be prevented from making a lease which should contain terms expressly, or by implication, exempting him from punishment for permissive or voluntary waste.

In the lease in this case there is an implied exemption from punishment for permissive waste. It differs, therefore, from the case of *Doe d. Bromley v. Bettison* (c), on which the plaintiff's counsel relied. That case was decided expressly on the ground that the deed creating the power stipulated against any clause in the lease, whereby power should be given to *commit* waste, or exempting him from punishment for committing it. The lease, therefore, which allowed any permissive waste, in the opinion of the Court, was not on that account void.

We therefore think that the lease is not according to the power, does not, therefore, operate to give any interest in

(a) 16 M. & W. 257.

Landlord and Tenant, 195.

(b) See Smith's Lecture on

(c) 12 East, 305.

the land, and operates only by estoppel between the parties to the lease, so that the trustees of the term of 500 years have no reversion, and cannot sue.

On both grounds of objection we think the defendants right, and are of opinion that the plaintiff is not entitled to recover.

Judgment for the defendants.

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THE GUARDIANS OF THE POOR OF THE HERTFORD
UNION v. KIMPTON and Another.

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THIS was a rule calling on the defendants to shew cause why the writ of certiorari, issued for the removal of the plaint in this case from the county court of Hertford into this Court, should not be quashed, and why a procedendo should not issue.

The plaint was issued for the recovery of the sum of 36*l.*, for money paid by the guardians of the poor of the Hertford Union for the use of the defendants on the abatement of a nuisance on premises within the Union, and of which premises the defendants were the owners, in pursuance of an order of two Justices of the Peace for the said borough, of the 17th of July, 1854, and for the costs and expenses reasonably incurred in obtaining such order and in carrying the same into effect, pursuant to "The Nuisances Removal and Diseases Prevention Act, 1848," (11 & 12 Vict. c. 123). The order of the Justices upon which the plaint in the county court was founded was as follows:—

"To the owners of the ditch and premises in the parish

has jurisdiction in such case, although title to the land comes in issue.

The 3rd section of the 11 & 12 Vict. c. 123, which directs that the amount paid for carrying into force an order of two justices under that statute to abate a nuisance may be recovered from the owner of the premises where the nuisance existed, either in the county court or by proceeding before two justices, gives those tribunals exclusive jurisdiction. And therefore the county court comes in issue.

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of St. Andrew, in the borough of Hertford, and to the Guardians of the Poor of the Hertford Union in the county of Hertford, and to their servants or agents, and to all whom it may concern.—Whereas, on the 10th day of July instant, complaint was made before the undersigned H. I., and J. G., two of Her Majesty's Justices of the Peace acting in and for the said borough of Hertford, by T. K., of Hertford, in the said borough, superintendent of police, that there was a foul and offensive ditch in the parish of St. Andrew, Hertford, in the said Union, and upon or adjoining premises in the occupation of W. W., the reverend H. S., and others (including part of the said ditch which is covered over or filled up), kept or constructed so as to be a nuisance to and injurious to the health of the said W. W., H. S., and all other persons resident near to the said owners: And whereas the owners of the said ditch and premises having this day appeared before us, two of her Majesty's Justices of the Peace acting in and for the said borough, to answer the matter of the said complaint, and it having been proved, that, upon or adjoining the premises aforesaid, there is a foul and offensive ditch, kept or constructed so as to be a nuisance to and injurious to the health of the said W. W. and H. S., and all other persons resident near to the said ditch: We do hereby, in pursuance of the statute in such case made and provided, order the said owners of the said ditch, within forty-eight hours from the service of this order, or a true copy thereof, according to the statute in such cases made and provided, to cover over the said ditch, including that part of the said ditch which is already covered over or filled up, so that the same shall not be a nuisance to and injurious to the health of the said W. W., H. S., and all other persons resident near to the said ditch: and if this order be not complied with, then we authorise and require you, the said guardians of the poor of the Hertford Union, in which union the parish of St. Andrew is situate, to enter upon the said ditch and premises, and to do all such works, matters, and things as may be necessary for carrying this

order into effect, according to the statute &c. And for your so doing, this shall be your sufficient warrant. Given under our hands and seals, this 17th day of July, 1854.

"H. I.

"J. G."

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The affidavit upon which the writ of certiorari was granted, stated that the defendants believed and were advised that many important questions of law and fact were likely to arise on the hearing of the plaint; that the questions would be, to whom did the ditch belong, whether it was in fact a ditch within the meaning of the 11 & 12 Vict. c. 123, whether it was not an ancient watercourse, and whether its cleansing and repairing was not imposed on the parish of St. Andrew?

Willes shewed cause.—The defendants contend, first, that the county court has not exclusive jurisdiction in such a case; secondly, that the order is not in compliance with the statute, and that this objection appears on the face of it. The first question turns on the 3rd section of the 11 & 12 Vict. c. 123. That section enacts, that "all costs and expenses reasonably incurred in obtaining such order, or in carrying the same into effect, shall be deemed to be money paid for the use of and at the request of the owner or occupier of the premises in respect whereof such costs and expenses shall have been incurred, and may be recovered as such by the said town council, trustees, commissioners, guardians, officers of health, or other body, or by the said procurators fiscal, deans of guild, commissioners of police, or trustees and inspectors of the poor respectively, in any county court, civil bill court, or (in Scotland) before the sheriff or magistrates or justices of the peace;" or the plaintiffs may, if they think fit, go before two magistrates. The question was before the Court of Queen's Bench in *Regina v. Harden* (a); and it is admitted that the views

(a) 2 E. & B. 188.

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which the learned Judges there took of it are unfavourable to the defendants, for the Court held, that a claim, such as this, may be recovered in the county court. Now the 58th section of the 9 & 10 Vict. c. 95, excludes those cases, where title to land comes in question, from the jurisdiction of the county court; and here it appears from the affidavit upon which the writ of certiorari was granted, that the title to the locus in quo was in question.

Secondly, the order is in pursuance of the 11 & 12 Vict. c. 123, for it states the place to be *adjoining* to the premises of the persons named in the order; and therefore the 20th section, by which orders made under the Act cannot be removed by certiorari, does not apply, as the order is not under the Act.

Lush in support of the rule.—First, the county court has exclusive jurisdiction. Where a statute imposes an obligation and a remedy is pointed out, that particular remedy must be followed. The general rule was laid down by *Dennison, J.*, in *Stevens v. Evans (a)*, and was adopted by *Alexander, C. B.*, in *Underhill v. Ellicombe (b)*, where he says, that “upon a new statute, which prescribes a particular remedy, no remedy can be taken but that particular remedy prescribed by the statute; therefore, clearly, no action of debt will lie for a poor’s rate.” So in *Doe d. Bishop of Rochester v. Bridges (c)*, Lord *Tenterden, C. J.*, in delivering the judgment of the Court, says that, “where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.” The 3rd section points out the remedy, and this Court cannot obtain jurisdiction in the matter incidentally. The opinion of the Court, as expressed in *Regina v. Harden*, is directly in the plaintiffs’ favour. Lord *Campbell, C. J.*, after stat-

(a) 2 Burr. 1157. (b) M’Cl. & Y. 450. (c) 1 B. & Ad. 847.

ing, that if the question had depended on the 58th section of the 9 & 10 Vict. c. 95, he should have been of opinion that the county court would not have had jurisdiction, proceeds to say: "But stat. 11 & 12 Vict. c. 123, s. 3, expressly gives the remedy in the county court, and, unless that Court has jurisdiction, there is no remedy by action at all; for the guardians of the poor have no capacity to sue but what is given to them by the statute. It is a new right given by statute, with a specific remedy, which may and must be pursued." The other members of the Court expressed the same opinion. It is clear that if the plaintiffs had adopted the other course open to them, by going before two justices for the recovery of these costs, the proceeding could not have been removed into the superior Court.—Secondly: there is no objection to the form of the order, which follows that prescribed in the schedule to the Act.

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ALDERSON, B.—I am of opinion that the rule must be absolute. I think that the legislature intended to give the county court summary jurisdiction in such cases. Where a particular remedy is pointed out and jurisdiction is given to an inferior tribunal, the superior Courts cannot obtain jurisdiction incidentally. And the Court of Queen's Bench are of opinion, that by the 3rd section of the statute (11 & 12 Vict. c. 123), it was intended to oust the jurisdiction of the superior Courts. It is clear, that if the plaintiffs had gone before two justices instead of to the county court, such proceeding could not have been removed. If this writ were allowed, how could we dispose of the plaint? I therefore think that the county court has exclusive jurisdiction. The order is good, for it follows the form given in schedule (C) to the Act.

PLATT, B., and MARTIN, B. (a), concurred.

Rule absolute.

(a) *Pollock*, C. B., had left the Court before the conclusion of the argument.

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JACKSON v. BEAUMONT.

The writ of prohibition, to restrain a judge of a county court from further proceeding in a matter over which he has no jurisdiction, is a writ of right.

A party who objects that the county court has no jurisdiction to determine a plaint does not acquiesce in the jurisdiction of that court, or waive his right to a writ of prohibition, by obtaining from the Judge the statement of a case for the opinion of a superior Court.

THIS was a rule calling on the plaintiff to shew cause why a writ of prohibition should not issue to restrain the judge of the Yorkshire county court holden at Leeds from further proceeding in this case, or why a certiorari should not issue to remove the plaint into this Court.

It appeared from the affidavits, that the plaint was issued in the county court for the recovery of 26*l.* 3*s.*, as the balance of a larger amount claimed on the sale of goods. The defendant resided at Manchester, and the goods in question had been ordered by him at Leeds, and were sent by way of Leeds to Manchester. At the time of the sale nothing was said either as to the carriage of the goods, or whether they were to be delivered at Leeds or Manchester. The defendant's counsel produced a consignment note signed by the plaintiff, for the purpose of shewing that the transaction was one of consignment, and not of sale. The jury, however, upon the question being put to them, found that the case was one of sale and not of consignment. The defendant's counsel then contended, that, inasmuch as the goods were ordered at Leeds, deliverable at Manchester, where the defendant resided, the whole cause of action did not arise within the jurisdiction of the county court of Leeds, and, therefore, that the plaintiff ought to be nonsuited. The Judge left it to the jury to say whether, although nothing was said about the carriage of the goods, it was not understood by the parties that they were to be delivered either at Leeds or at Manchester. The jury found a verdict for the plaintiff.

The defendant afterwards appealed against the direction of the county court judge. The appeal was entered in this Court, and stood in the paper for argument at the time this rule came on.

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T. Jones shewed cause.—The court had jurisdiction, and the judge correctly left the question to the jury, whether the goods were to be delivered at Manchester or Leeds. Assuming, however, that the goods were to be delivered at Manchester, and not at Leeds, and, consequently, that the *whole* cause of action did not arise within the jurisdiction of the county court where the plaint was tried, and that, therefore, the court, in fact, had not jurisdiction, as in *Borthwick v. Walton* (a), and *Barnes v. Marshall* (b); still there is no ground for either a prohibition or a certiorari, since the defendant, by having applied for and obtained the statement of a case for the opinion of this Court, has acquiesced in the jurisdiction of the county court. This question was discussed in *Marsden v. Wardle* (c). The law gives the defendant a remedy, by granting him the power of applying to the judge to state a case. This he has done, and thereby has subjected the plaintiff to much expense. The question raised by this rule is also made the subject-matter of that case. And it is unjust that both remedies should be allowed. In *Roberts v. Humby* (d), *Parke, B.*, cites with approbation what was said by Lord *Mansfield* in *Buggin v. Bennett* (e), that, “If it appears upon the face of the proceedings that the Court below have no jurisdiction, a prohibition may be issued at any time either before or after sentence, because all is a nullity. It is *coram non judice*. But, where it does *not* appear upon the face of the proceedings if the defendant below will lie by or suffer that Court to go on under an apparent jurisdiction, as upon a contract made at sea, it would be unreasonable that this party, who, when defendant below, has thus lain by and concealed from the Court below a collateral matter, should come hither after

(a) 15 C. B. 501.

(b) 21 L. J., Q. B., 388.

(c) 3 E. & B. 695.

(d) 3 M. & W. 120.

(e) 4 Burr. 2037.

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sentence against him there, and suggest that collateral matter as a cause of prohibition, and obtain a prohibition upon it after all this acquiescence in the jurisdiction of the court below." It would seem, that there is no direct authority for saying that this form of proceeding is a matter of right. In *Clay v. Snelgrave (a)*, the Court doubted whether the writ of prohibition was a matter of right, or whether it was discretionary.

Edwin James and C. Pollock were not called upon to support the rule.

ALDERSON, B.—I am clearly of opinion that the writ of prohibition ought to go. Waiving the question for the present, whether, if there had been an acquiescence on the part of the defendant in the jurisdiction of the county court, the writ could have been refused, I think that, in fact, there was no acquiescence whatever; for the defendant distinctly insisted that the Judge had no jurisdiction, and his object all along was to raise this point. It appears to me that, under the circumstances, there was no pretence whatever for saying that the whole cause of action arose within the jurisdiction of the county court of Leeds, for the goods were to be delivered at Manchester, where the defendant resided; and the result of *Borthwick v. Walton (b)* and of the true construction of the 60th section of 9 & 10 Vict. c. 95, is, that where the defendant does not reside within the jurisdiction, the *whole* cause of action must arise within the jurisdiction of the county court, in order to give the judge jurisdiction. In this case, when the judge left it to the jury to say whether the goods were to be delivered at Leeds or Manchester, he, in fact, left to them the question whether he had jurisdiction or not. That he could not properly do.

(a) 1 Ld. Raym. 576.

(b) 15 C. B. 501.

PLATT, B.—Unless a constant protest against the jurisdiction of the judge is to be construed as an acquiescence in his jurisdiction, there is no acquiescence here. This was an improper attempt on the part of the judge to obtain jurisdiction. If he had had jurisdiction, I should have thought the case a fit one to have been removed by certiorari.

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MARTIN, B.—I am also of opinion that in this case a writ of prohibition ought to go. The writ is of right, but not of course. Its true nature and character were pointed out by *Manfield*, C. J., in the case of *Buggin v. Bennett (a)*, namely, that where a party has established the facts upon which he founds his application to the satisfaction of the Court, he is entitled to the writ as of right. In this respect it resembles a mandamus and quo warranto. Here there has been no acquiescence whatever by the plaintiff; and my judgment is founded on the statement which the judge himself gives of the transaction. It was wrong on his part to leave any question to the jury, as it is perfectly clear that the goods were to be delivered at Manchester.

ALDERSON, B.—It appears from Willmot's notes at page 82, that "a writ which issues upon a probable cause, verified by affidavit, is as much a writ of right as one which issues of course." In my opinion, that position contains as much good law as it does good sense.

Rule absolute.

(a) 4 Burr. 2037.

1855.

June 12.

WARRINGTON v. LEAKE.

On an application to set aside a judgment signed in default of appearance under the 27th sect. of the Common Law Procedure Act, 1852, an affidavit, stating the precise nature of the defence, is not required, but the ordinary affidavit of merits is sufficient.—
Per *Parke, B.*, and *Platt, B.*; *Pollock, C. B.*, dubitante; *Martin, B.*, dissentiente.

An affidavit in answer to such affidavit ought not to be allowed.—
Per *Pollock, C. B.*, and *Platt, B.*; *Parke, B.*, and *Martin, B.*, contra.

THIS was a rule calling on the defendant to shew cause why an order of *Parke, B.*, by which the judgment signed herein by the plaintiff for want of appearance was set aside and the defendant let in to plead, should not be rescinded.

The defendant's affidavit, upon which the order was made, stated that the action was brought upon six promissory notes for 4383*l.* 12*s.*, made by the defendant as co-surety with one Early for one J. S. Leake; that the plaintiff had sued Early upon one of the notes, in which action Early had obtained a verdict on the ground that the note had been altered in a material particular; and that, to the best of deponent's belief, all the notes had been similarly altered; that time had been given by the plaintiff to J. S. Leake without the defendant's privity; that the defendant is in his 77th year, and that he believes that he was served with the copy writ of summons on the 23rd May, and that when he was served he wrote that date on the copy of the writ and handed it on the following day to his attorney, with directions to enter an appearance in the action for him in due time and to defend it on the merits. The affidavit concluded as follows: "and that I am advised and believe that I have a good defence to the action on the merits thereof." The affidavit of the defendant's attorney, stated that he received the copy writ so indorsed, on the 24th of May, from the defendant; that the defendant, when asked when the writ was served, pointed to the indorsement; that he entered an appearance for the defendant on the 30th of May, which would have been in time if the defendant's statement had been correct; that it was owing solely to the defendant's mistake that the appearance was not in time; and that the deponent did not

learn that judgment had been signed till the 4th of June following.

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Upon the hearing of the summons before *Parke*, B., an affidavit made by the plaintiff was tendered on his behalf, which stated that the defendant had acted as the plaintiff's attorney in the action on the note against *Early*; that the alteration in the note had been made at the suggestion of the defendant himself; and that *Early* had obtained the verdict in the action on that note, solely on the ground that the alteration had been made without *Early*'s knowledge, and that the other notes were not in the same position; and that the plaintiff would abandon all claim with respect to that note rather than that the judgment should be set aside, as he was informed that the defendant was making away with his property, which he would be enabled to do if judgment in this action were to be set aside.

Bramwell and *Archibald* shewed cause. — The first objection which the plaintiff will advance is, that the affidavit in support of the order is not such as is required by the 27th section of the Common Law Procedure Act, 1852. That section, after enacting that judgment may be signed in default of appearance upon a writ specially indorsed, provides "that it shall be lawful for the Court or a Judge, either before or after final judgment, to let in the defendant to defend, upon an application supported by satisfactory affidavits accounting for the non-appearance and disclosing a defence upon the merits." The plaintiff will contend that by the words "disclosing a defence upon the merits," the defendant must set forth fully his defence, and that the ordinary and old form of affidavit is insufficient. But this Act of Parliament introduces a new practice. The proceeding by way of signing judgment in default of appearance confers a boon upon a plaintiff. A defendant now has judgment signed against him, perhaps without any notice, which formerly was not the case.

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Secondly, the statute does not entitle a plaintiff to answer the defendant's affidavit in support of an application to set aside the judgment, by counter affidavits. It was not intended that such question of fact should be tried and determined by a Judge alone.—He was then stopped by the Court.

Willes in support of the rule.—The defendant's affidavits are not sufficient. The 27th section clearly shews that the ordinary affidavit of merits was not intended. Effect ought to be given to the words used in the proviso. In *Fordyce v. Bridges* (a), Lord *Brougham* said, "We must construe this statute by what appears to have been the intention of the legislature. But we must ascertain that intention from the words of the statute, and not from any inference to be drawn from the nature of the objects dealt with by the statute." A person cannot be said to "disclose" his defence unless he specially states what that defence is. The defendant does not, in his affidavit, negative the fact that the note was altered by his consent. In *Graham v. Sandrini* (b) it was held that an affidavit, which states only that the deponent has been informed and believes that the defendant is about to leave England, without stating from whom the defendant obtained the information, is not sufficient ground for an order for the defendant's arrest. [*Parke, B.*—I cannot assent to the argument, that, in a case where it is sought to make a defendant liable behind his back, as it were, a stricter affidavit should be required, upon an application by him to be allowed to come in and defend the action, than formerly was necessary where a defendant had been duly served, had appeared, and had pleaded to the action. For this reason it seems to me that the ordinary affidavit of merits is sufficient.] Upon that

(a) 1 H. L. Cas. 1.

(b) 16 M. & W. 191.

construction of the proviso full effect is not given to its language.

Secondly, the affidavit of the plaintiff was properly received, and completely answers the defendant's affidavits: *Pegler v. Hislop* (a).

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POLLOCK, C. B.—It may be that the legislature, by the adoption of the language in question in the proviso of the 27th section, intended that something more than the ordinary affidavit of merits should be required; but the word “disclose” is a very vague and general expression, and may mean no more than that the party shall *state* his defence. I cannot say that I entertain a very strong opinion as to what is the true construction of this clause, which introduces a mode of procedure perfectly new. [His Lordship read the 27th section, and proceeded.] That section enables a plaintiff to sign judgment in case of the non-appearance of the defendant, although personal service of the writ of summons has not been effected,—the effect of which may be that persons, through some mistake on their part, may find themselves suddenly incumbered with a judgment signed against them, of which they know absolutely nothing, or at least of which they have not received such notice as used formerly to be required, under the old practice, before a plaintiff was entitled to sign judgment. This proviso was introduced for the purpose of guarding against such mischief. Now the word “disclosing,” if the proper sources are sought to obtain its true definition, apparently points to something more than “adverting to,” or “stating,” or simply “telling,” which are some of its definitions. It was probably intended that something more was meant, but of that I am by no means certain. The legislature has made use of a word which does not necessarily convey more than the sense of “telling,” and as this uncertainty

(a) 1 Exch. 437.

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exists, I think we ought to take care how we permit a defendant to be bound by a judgment signed against him, in a case such as the present, in a mode of procedure which, but for this enactment, would not be permitted by the law of the land. I therefore think that the defendant's affidavit is sufficient, and that the order of my Brother *Parke* is right. It appears also that an affidavit in answer to the defendant's was allowed. As the Act does not speak of affidavits to be made on both sides, I am inclined to think, that an affidavit in answer to those in support of the application to set aside the judgment, ought not to be received. In this case, as the facts appear, I do not feel indisposed to allow the judgment to stand as a security. Still I think we ought to dispose of the case in such a way as not to allow the judgment to stand as a bar to the defendant's dealing with his property. As I do not entertain a very confident opinion upon the matter, and as my Brothers *Parke* and *Platt* are of opinion that the rule ought to be discharged, I agree, though not without doubt, to the adoption of that course. I think that the affidavit in answer ought not to have been received. Upon the principal matter I entertain great doubt, but upon the whole I think the safest course will be to allow the order setting aside the judgment to stand.

PARKE, B.—I entertain the same opinion I did when the matter was before me, and I think that the order was properly made, and that the rule ought to be discharged. The first question—and it is an important one—is, what is the meaning of the 27th section? Under this enactment, a plaintiff may sign final judgment upon filing an affidavit of personal service of the writ of summons, or a Judge's order for leave to proceed; so that, in the latter case, the plaintiff may sign judgment as if personal service had been effected. It may happen that the defendant has no knowledge whatever of the proceedings against him,

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and, in order for his protection, the proviso to the 27th section was framed, on the construction of which the question turns. I think that the proviso only requires an affidavit satisfactorily accounting for the nonappearance, and the ordinary affidavit of merits. I think that the sentence is not perfectly complete as it stands, but that it was so framed for the sake of brevity and simplicity. When the matter was before me, I could not see why more should be required than the ordinary affidavit of merits under the old practice, where the defendant had appeared and had taken several steps in the action, and judgment had been snapped against him. I therefore think the mere affidavit of merits is sufficient, without stating the ground of defence, as used to be the case under the old practice of letting in a defendant to defend upon a simple affidavit: *Blewitt v. Gordon* (a). There my Brother Coleridge refused to receive an affidavit in answer to the defendant's affidavit. I do not, however, wish to go the length of saying, that where the application is founded on a short affidavit disclosing a defence, an affidavit in answer should not be received by the Judge. I cannot assign any probable or possible reason why the legislature should require more than the ordinary affidavit of merits, by the adoption of the words "disclosing a defence on the merits." If the legislature had said, that, in a case where a judgment had been snapped against a defendant, he must in his affidavit state the particular facts of his defence, the Act would have been intelligible. I thought that this case could not be satisfactorily tried on affidavits, and therefore that the defendant ought to be let in to plead that the question between him and the plaintiff might be tried before a jury, assisted by a Judge. It may turn out that he has no defence to the action, but that is no reason why he should not have an opportunity of presenting his case to a

(a) 1 Dowl. N. S. 875.

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jury, where his own evidence and that of his witnesses will be received. This is a very important question, and one that ought to be settled for the sake of the due administration of justice. In my opinion, the statute does not require, in a case like the present, more than the ordinary affidavit of merits.

PLATT, B.—I am also of opinion that the rule ought to be discharged. It is impossible to suppose that the legislature, in framing this 27th section, had not in their minds the then existing practice of the Courts of letting in a defendant to plead, where judgment had been snapped against him through some mistake on his part, on a simple affidavit of merits. This was the ordinary practice before the passing of the Common Law Procedure Act. The case against this defendant is even weaker than that class of cases where application was formerly made to set aside the judgment, for greater indulgence is now given to a plaintiff. In my opinion, the 27th section has not altered the practice with respect to the affidavit, by requiring more from a defendant than used to be required. I have had this question frequently before me at Chambers, and I have come to the conclusion, that by “disclosing” is meant averring a good defence on the merits. This is the only condition to which a defendant is subjected on an application to set aside a judgment, for the Act does not proceed to state that such affidavit may be answered by an affidavit made on the part of the plaintiff. It appears that this judgment was snapped through a mistake of the defendant as to the day on which he was served with the writ of summons. This properly accounts for his non-appearance. That part of the 27th section, which requires the non-appearance to be accounted for, has been complied with. Then the section goes on to require the affidavit “to disclose a defence on the merits,” but it does not say that the defendant shall disclose “facts” or “the grounds

of his defence." I therefore think that the ordinary affidavit alone is sufficient. I also think that counter affidavits ought not to be received, as it would be highly inconvenient and improper to expect a defendant, who has not been even served with process, to try the action on the merits when he may know nothing whatever about the matter.

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MARTIN, B.—I am sorry that I cannot concur in the opinions expressed by the other members of the Court. The 27th section expressly provides, that a defendant may be let in to defend by the Judge "upon an application supported by satisfactory affidavits, accounting for the non-appearance and disclosing a defence on the merits." The word "disclosing" is not uselessly employed by the legislature, but is a very apt and appropriate term, and ought to have that force attributed to it which it properly bears. Knowing, as I do, what the nature of the affidavit was which went by the name of "an affidavit of merits" under the old practice, and finding that the new law requires the affidavit of merits to "disclose the defence," I come to the conclusion that something more is now required than the ordinary affidavit of merits. This statute has now been in operation for nearly three years; and although very many thousand writs of summons are issued every year, I am not aware of a single case where judgment has been set aside on the ground that the writ has not reached the defendant's hands. The new system which this statute introduced has worked well, and been productive of great benefit to the public, and great reduction of expense to the suitors. It certainly seems to me, that the legislature intended that effect should be given to the word "disclosing." On referring to the 52nd section of the Common Law Procedure Act, 1854, I find the word "disclosing" omitted, and I therefore think that the word has some signification, and that a party seeking to set aside a judgment is bound

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to do something more than merely to say that he has a defence on the merits; he ought also to state what his defence is. If, however, such an affidavit as this of the defendant's is to be held good, I think that the counter affidavit was properly received; and I cannot shut my eyes to the fact which is stated in it, that the defendant is disposing of his property and is about to abscond; and therefore, if the decision of the case rested with me, I should let the defendant in to defend, but the judgment should stand as a security.

Rule discharged.

TRINITY VACATION, 19 VICT.

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KINGSMILL v. MILLARD.

June 20.

EJECTMENT to recover possession of two cottages and two gardens situate at Cutler's-green, in the parish of Chewton Mendip, in the county of Somerset.—The defendant appeared to the writ and defended as landlord.

At the trial, before *Crowder, J.*, at the last Somerset Assizes, the following facts appeared:—By indenture of the 24th October, 1799, between Robert Kingsmill of the one part, and William Sheppard of the other part, R. Kingsmill, in consideration of 40*l.*, demised to W. Sheppard "all that cottage or tenement, formerly two cottages, with the gardens thereto adjoining and belonging, situate and being at a place heretofore called Farmer's Cross, and now known by the name of Cutler's-green, in the parish of Chewton Mendip, in the county of Somerset: and also a piece or parcel of land lying near to the said cottage or tenement, containing by estimation three quarters of an acre (more or less), lately used as garden ground, and some time since in the tenure and occupation of Robert Bull, as tenant thereof:" Habendum for three lives, at the yearly rent of 5*l.* In the year 1806, Sheppard assigned the above lease to one Robbins. At that time there was a fence along the garden on the side of it adjoining a public highway; but

Where a tenant incloses land, whether adjacent to, or distant from, the demised premises, and whether the land be part of a waste, or belong to the landlord or a third person, it is a presumption of fact, that the inclosure is part of the holding, unless the tenant, during the term, does some act disclaiming his landlord's title.

Certain premises were demised by the description of "all that cottage or tenement, with the garden thereto adjoining and belonging, situate &c.;

and also a piece or parcel of land lying near to the said cottage or tenement, containing by estimation three quarters of an acre (more or less), lately used as garden ground."—*Held*, that, under such description, an adjoining piece of waste land would not pass, unless it had been theretofore used as an outlet of the garden.

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between the fence and the highway there was a strip of waste land, which the plaintiff now sought to recover. About forty years ago, Robbins inclosed this piece of waste land and occupied it together with the demised premises. At that time there was a shed upon it. In the year 1816, Robbins assigned the original lease to one Curtis, and Robbins continued to occupy the piece of waste land which he had inclosed. In the year 1822, Robbins, by lease and release, conveyed as freehold the waste land to Curtis, who pulled down the shed and built two cottages upon it. In 1848 the plaintiff advertised for sale some of the property at Chewton Mendip, including the two cottages in question, but they were not sold, in consequence of Curtis having attended and opposed the sale. The defendant, who claimed under the will of Curtis, had received rent for the cottages in 1849. The last of the three lives mentioned in the original lease expired in 1854. The plaintiff deduced his title from Robert Kingsmill, the original lessor.

It was submitted on the part of the plaintiff, that the presumption of law was, that the waste belonged to the owner of the adjoining land, and that a tenant who inclosed it did so for the benefit of his landlord, and at the end of his term was bound to give it up, together with the other land. The learned Judge directed the jury in accordance with the ruling of *Parke, J.*, in *Doe d. Lewis v. Rees (a)*; and his Lordship left it to the jury to say, whether the inclosure was made by Robbins for his own benefit or for the benefit of his landlord. The jury found that the inclosure was made by Robbins for his own benefit, and not for the benefit of his landlord; and a verdict was entered for the defendant, leave being reserved to the plaintiff to move to enter a verdict for him.

Kingslake, Serjt., in the following Term, obtained a rule

(a) 6 C. & P. 610.

nisi accordingly, on the ground that the presumption of law upon the facts proved was, that the land inclosed belonged to the plaintiff; or for a new trial on the ground that the verdict was against the evidence.

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J. B. Karslake and *H. Bullar* now shewed cause.—Assuming that the presumption is, that encroachments made by a tenant are for the benefit of the landlord, there was in this case evidence to rebut that presumption. The plaintiff relies on *Doe d. Challnor v. Davies* (a); but as observed by Lord *Denman*, in *Small v. Nairne* (b), *Espinasse's Reports* are of little authority. In *Doe d. Lloyd v. Jones* (c), *Alderson, B.*, says, "The presumption of law (d) being that the tenant inclosed for the benefit of his landlord, it is for the defendant to rebut that presumption." [*Alderson, B.*—The more correct expression would be, that the tenant incloses for the purpose of adding to his holding.] In this case the inclosure has been held adversely. The landlord was aware of the inclosure and made no objection to it, and the tenant, after occupying it for a number of years as distinct from the premises, conveyed it as his own freehold to a third party, who built two cottages upon it; but the landlord never demanded any rent for the cottages, and when he advertised them for sale his title was disputed. In *Andrews v. Hailes* (e), the tenant had inclosed and built on waste land not belonging to his landlord, and separated from his holding by a road; and there was no circumstance to rebut the presumption that the encroachment was part of the holding, but the mere intervention of the road. [*Alderson, B.*—In that case my Brother *Coleridge* seems to have considered that the circumstance of the buildings on the encroachment being occupied for

(a) 1 Esp. 461.

(b) 13 Q. B. 844.

(c) 15 M. & W. 580.

(d) In the copy of 15 M. & W.

belonging to the Court of Exchequer, *Alderson, B.*, has substituted the word "fact" for "law."

(e) 2 E. & B. 349.

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the purposes of a trade wholly unconnected with the occupation of the demised premises would be a fact to be weighed as rebutting the presumption, but, in my opinion, it would not be entitled to much weight. It seems to me, that the acts of the tenant to rebut the presumption should be such acts as in a manner set the landlord at defiance; for instance, if the tenant gave the landlord notice of a conveyance, and he did not interfere: but if the landlord has no knowledge of it, what is there to undeceive him in supposing that the tenant occupies the waste as part of the holding?]

Bryan d. Child v. Winwood (a), where it was held that a lessee for lives cannot acquire a fee by encroachment upon the waste adjoining the land, though accompanied by thirty years uninterrupted possession, was decided before the Statute of Limitation, 3 & 4 Will. 4, c. 27. In *Doe d. Croft v. Tidbury (b)*, the rule of law is thus stated by *Jervis, C. J.*, "Where a tenant who holds under the lord of a manor encroaches upon the waste, he is presumed to have approved against the commoners for the benefit of the lord: in other cases, when the power to encroach is derived from the occupation of the premises held from a landlord, and the encroachment is occupied as if it was part of the holding, then, at the end of the tenancy, the presumption as between the landlord and tenant is, that it is part of the holding and it belongs to the landlord. We do not mean that the encroachment must, under such circumstances, be taken to have been included in the original letting, for that would conflict with the rule, that the tenant may rebut the presumption that he inclosed for his landlord, by clear evidence that he intended the encroachment for himself at the time he made it." Here the encroachment was occupied as distinct from the holding; the tenant assigned to another person the demised premises, but continued in possession of the encroachment. The cir-

(a) 1 Taunt. 208.

(b) 14 U. B. 304.

cumstances shew that he never intended it as an adjunct to the demised premises, but as a totally distinct property. —They also referred to *Doe d. Lewis v. Rees* (a), *Doe d. Dunraven v. Williams* (b), and *Doe d. Lloyd v. Jones* (c).

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Kingslake, Serjt., and *C. Saunders* in support of the rule.—Where there is waste land between a highway and inclosed land, if a lease be made of the inclosed land, the presumption is that the waste passes with it: *Doe d. Pring v. Pearsey* (d). [*Parke*, B.—There the language of the lease excludes the waste. The principal question is, whether there is evidence to rebut the presumption that the waste was inclosed for the landlord's benefit.] The presumption of law is in favour of the landlord. Where the landlord is lord of a manor, and his tenant encroaches on the waste, the presumption clearly is, that he has done so for the benefit of the lord who had a right to approve. The presumption is equally strong where the land inclosed by the tenant *primâ facie* belongs to the owner of the demised premises, as in the case of waste adjoining a highway. [*Parke*, B.—It can hardly be said that the tenant incloses for the benefit of his landlord, when the assent of the landlord would make him a trespasser, as in the case of an inclosure of land belonging to a third person. The more correct definition is that of Lord *Campbell*, in *Andrews v. Haines* (e), viz. that where the encroachment is taken and used as part of the holding, the presumption is, as between landlord and tenant, that it belongs to the landlord, and the tenant can no more dispute his title to it than to any part of the premises.] Where the inclosure is at a distance from the demised premises, it is a question of fact whether the tenant inclosed and used it as part of the holding; but where, as here, the land inclosed adjoins the de-

(a) 6 C. & P. 610.

(d) 7 B. & C. 304.

(b) 7 C. & P. 332.

(e) 2 E. & B. 349.

(c) 15 M. & W. 584.

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mised premises and *primâ facie* belongs to the landlord, it is a presumption of law that the tenant inclosed it for the benefit of his landlord. [*Parke, B.*—It is more properly called a presumption of fact, since it may be rebutted by evidence.] *Bryan d. Child v. Winwood* (a), *Andrews v. Hailes* (b), and *Doe d. Lewis v. Rees* (c), are express authorities in the plaintiff's favour. [*Parke, B.*—The doctrine must be understood with this qualification, that if the tenant has disclaimed his landlord's title to the inclosure, from that time it will cease to be part of the holding. Suppose that in this case Robbins had sent to his landlord a copy of the conveyance of the inclosure to Curtis, that would have amounted to a disclaimer of the landlord's title, and he must have brought an ejectment within twenty years from that act.]

PARKE, B.—The rule must be absolute for a new trial. It is laid down in all the cases—whether the inclosed land is part of the waste, or belongs to the landlord or a third person—that the presumption is, that the tenant has inclosed it for the benefit of his landlord, unless he has done some act disclaiming the landlord's title. I am disposed to discard the definition, that the encroachment is made “for the benefit of the landlord,” and to adopt that of Lord *Campbell*, viz. that the encroachment must be considered as annexed to the holding, unless it clearly appears that the tenant made it for his own benefit. It is not necessary that the land inclosed should be adjacent to the demised premises; the same rule prevails when the encroachment is at a distance. That is now the law; and I must add, that even though at the time of making the encroachment there is nothing to rebut the presumption that the tenant intended to hold it as a portion of his farm, yet circumstances may afterwards occur by which it may be severed from the farm: for instance, if the tenant conveys

(a) 1 Taunt. 208. (b) 2 E. & B. 349. (c) 6 B. & P. 610.

it to another person, and the conveyance is communicated to the landlord, then it can no longer be considered as part of the holding. But if the landlord is allowed to remain under the belief that the encroachment is part of the farm, the tenant is estopped from denying it, and must render it up at the end of the term as a portion of the holding. In this case there are certainly circumstances to be considered by the jury, as to the intent of the tenant to use the encroachment unconnected with the enjoyment of the demised premises. The tenant also makes a conveyance of the encroachment, but as the landlord was not informed of it, it cannot affect him; for he would naturally believe that the tenant intended to hold it with the farm, and would give it up at the end of the term.—It is rather a nice question, whether the waste passed as parcel of the demised premises. It may be that the landlord meant it to be demised, but still the question arises, whether there are words in the lease capable of carrying it. If the lease had been in general terms, “all that piece or parcel of land &c., together with all rights and appurtenances thereto belonging and appertaining,” there would have been no question; but it is not so. The description is, “All that cottage or tenement, formerly two cottages, with the garden thereto adjoining and belonging, situate &c. And also a piece or parcel of land lying near to the said cottage or tenement, containing, by estimation, three quarters of an acre (more or less) lately used as garden ground, and some time since in the tenure or occupation of Robert Bull as tenant thereof.” Under that description nothing passes but what has been heretofore used as garden ground. Therefore the question, whether the adjoining strip of land passed, will depend on whether or no it was ever used as parcel of the garden. If it has been used as an outlet of the garden, as for instance, to put manure upon, it would pass. It is a question for the jury, whether this piece of land was parcel of the garden in the same sense as a fence is parcel of a garden. I

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cannot see why the landlord should have reserved it to himself; but at the same time, there are no words in the lease which can be understood as conveying it. If there had been in this lease a revocation of a right of way over the waste, it would have precluded all question.

ALDERSON, B.—I am of the same opinion. If it could be shewn in any way that the strip of land had contained manure for the purposes of the garden, it would pass under the description in the lease. But if it did not pass, the presumption is, that the tenant meant to annex it to his holding. The presumption is increased by the circumstance, that the strip of land was of no value to any one but the holder of the demised premises.

PLATT, B.—I agree as to both points, and for the reasons assigned. At first I entertained some doubts as to whether the description in the lease was not sufficient to pass the strip of land. It seemed to me that the doctrine laid down by *Holroyd, J.*, in *Doe d. Pring v. Pearsey (a)*, governed the case. But I concur in opinion that there ought to be a new trial.

Rule absolute for a new trial.

(a) 7 B. & C. 304.

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ELLIOTT v. BISHOP.

July 5.

A SPECIAL case had been stated for the opinion of this Court, under the 46th section of "The Common Law Procedure Act, 1852," the question being, whether the plaintiff had any right or title to sell to the defendant certain tenant's fixtures and trade fixtures. The case was argued last Michaelmas Term, when the Court differed in opinion, but the majority considered that the plaintiff had a right to sell the trade fixtures but not the tenant's fixtures; and judgment was given for the plaintiff for the value of the trade fixtures, and for the defendant as to the tenant's fixtures (a). No agreement having been entered into as to costs, the Court, on a subsequent application, held that the plaintiff was entitled to the general costs of the cause, subject to deduction of any costs which the defendant might have incurred in respect of that part of the case on which he succeeded (b). The Master taxed the defendant's costs at 11*l.* 5*s.* 6*d.*, which he deducted from the plaintiff's costs, amounting to 45*l.* 12*s.* 8*d.*, and an allocatur was given for 34*l.* 7*s.* 2*d.*, which amount was indorsed on the judgment roll as the plaintiff's costs in the cause. The defendant afterwards brought error upon the judgment on the special case, when the Court of Exchequer Chamber were of opinion that the plaintiff had a right to sell not only the trade fixtures but also the tenant's fixtures; and they ordered that the judgment entered for the

A special case was stated under the 46th section of the "Common Law Procedure Act, 1852," in which the question was, whether the plaintiff had a right to sell to the defendant certain tenant's fixtures and trade fixtures. The Court gave judgment for the plaintiff for the value of the trade fixtures, and for the defendant as to the tenant's fixtures. The Master, on taxation, allowed the plaintiff the general costs of the cause, deducting therefrom the costs of the defendant, in respect of that part on which he had succeeded. The defendant took proceed-

ings in error, and the Court of error reversed the judgment for the defendant, and affirmed the judgment for the plaintiff, and increased it by the value of the tenant's fixtures, but made no mention of costs:—*Held*, that this Court had no power to direct the Master to review his taxation, by allowing the plaintiff his costs of the proceedings below, and disallowing those of the defendant; but that the costs must be taxed according to the judgment of the Court of error.

(a) 10 Exch. 496.

(b) 10 Exch. 522.

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defendant as to the tenant's fixtures should be reversed, and that the judgment entered for the plaintiff should be affirmed and increased by the value of the tenant's fixtures (a). On taxation, the plaintiff claimed the 45*l.* 12*s.* 8*d.*, the amount at which his costs were taxed before deducting the 11*l.* 5*s.* 6*d.*; but the Master considered that he had no power to allow it without the order of a Judge. An application was made to *Platt*, B., at Chambers, who referred the parties to the Court; whereupon

Bovill, in last Term, obtained a rule, calling on the defendant to shew cause why the Master should not tax and allow the plaintiff his costs, and disallow the defendant's costs.

Maude shewed cause (June 8).—This Court has no jurisdiction to entertain the question of costs, which can only be dealt with by the Court of error: *Francis v. Doe d. Harvey* (b). That Court, however, has made no order respecting costs; and if this application were successful, its effect would be to alter the judgment of that Court. Where, indeed, a Court of error altogether reverses the judgment of the Court below, the costs follow the event; but, in this case, the Court of error has only increased the amount for which judgment was given for the plaintiff in the Court below. Reliance will be placed on the 157th section of "The Common Law Procedure Act, 1852," which enacts, that "Courts of error shall in all cases have power to give such judgment, and award such process, as the Court from which error is brought ought to have done, without regard to the party alleging error." That, however, must mean "such judgment on the *matter brought before them* as the Court below ought to have given." Here, the proceedings in error were solely in respect of that part of the judgment which was in favour of the plain-

(a) See the case, ante, p. 113.

(b) 5 M. & W. 272.

tiff. The case resembles that of a judgment for a plaintiff on one count of a declaration, and for the defendant on another; and, formerly, if in such case the defendant brought a writ of error to reverse the judgment for the plaintiff, the Court of error could not inquire into the validity of the judgment for the defendant, no error being assigned thereon: *Campbell v. French* (a). The principle is the same, notwithstanding the mode of proceeding in error is altered. [*Martin, B.*, referred to the 32nd section of the Common Law Procedure Act, 1854.]

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Bovill in support of the rule.—This Court has power to direct the Master to tax these costs. Before “The Common Law Procedure Act, 1852,” a writ of error was a new suit, and the costs in error were taxed by the officer of that Court. Now, a proceeding to error is a step in the cause, sect. 148; and, consequently, the costs must be taxed by the officer of the Court in which the suit originated. The circumstance that no error was alleged in respect of that part of the special case on which the defendant succeeded is immaterial, for, by the 157th section, Courts of error may give such judgment as the Court below ought to have given, “without regard to the party alleging error.” [*Martin, B.*—That clause was introduced in consequence of the decision in *Pollitt v. Forrest* (b), that, on error brought either by the plaintiff or defendant below, the Court of error, if the judgment were erroneous, might give a right judgment for the plaintiff in error, but not against him.] By the 32nd section of “The Common Law Procedure Act, 1854,” which allows error to be brought upon a judgment on a special case, “the Court of error shall either affirm the judgment or give the same judgment as ought to have been given in the Court in which it was originally decided.” The 41st section, which

(a) 6 T. R. 200.

(b) 11 Q. B. 949.

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relates to appeals, also provides that "all such further proceedings may be taken thereupon as if the judgment had been given by the Court in which the record originated." *Fisher v. Bridges* (a) and *Marshall v. Jackson* (b) have no bearing on this case, for there the question was as to the right of the defendant to costs in error on the reversal of a judgment for the plaintiff. *Evans v. Collins* (c) and *Gilbart v. Gladstone* (d) are express authorities, that the party who has succeeded in the Court of error is entitled to his costs in the Court below. The Pleading Rule, Hil. T., 1853, r. 25 (e), provides, that "the costs of proceeding in error shall be taxed and allowed as costs in the cause." Formerly, when the Master of this Court attended the Court of error, he did so as an officer of that Court; but now, when, on the day of the argument, the Master brings the judgment roll into the Court of error, he acts as an officer of this Court: sect. 155. Moreover, the plaintiff cannot sign final judgment until the costs are taxed: 1 Chit. Arch., 510, 8th ed.

Cur. adv. vult.

PARKE, B., now said.—This was a rule to review the Master's taxation of the plaintiff's costs. A special case had been stated for the opinion of this Court, in which the question was, as to the right of the plaintiff to dispose of certain trade fixtures and tenant's fixtures. The Court gave judgment for the plaintiff as to the trade fixtures and for the defendant as to the tenant's fixtures. The case was carried up to a Court of error by way of appeal, and that Court not only affirmed the judgment for the plaintiff as to the trade fixtures, but also adjudged him entitled to the tenant's fixtures. The question now is, whe-

(a) 4 E. & B. 666.

(b) 4 E. & B. 669, n.

(c) 2 D. & L. 989.

(d) 12 East, 668.

(e) 4 E. & B. lxxxii.

ther the costs ought to be taxed, by the Master of this Court, for the plaintiff on that part of the claim on which he failed in the Court below. We are of opinion that this Court has no power over the subject-matter, and that it ought to be determined by the Court of error. By the rule of the common law, when error was brought by the defendant below, the Court of error, in ordinary cases, could only reverse the judgment *simpliciter*; but, on a special verdict, they might give such judgment as the Court below ought to have given. The 32nd section of "The Common Law Procedure Act, 1854," which for the first time makes a special case the subject of appeal to a Court of error, enacts, that "error may be brought upon a judgment upon a special case in the same manner as upon a judgment upon a special verdict, unless the parties agree to the contrary" (and they have not done so in this case); "and the proceedings for bringing a special case before the Court of error shall, as nearly as may be, be the same as in the case of a special verdict; and the Court of error shall either affirm the judgment,"—and there it is not, "or shall reverse the judgment," but it is, "or give the same judgment as ought to have been given in the Court in which it was originally decided." In this case, unless there is some record to the contrary, it must be presumed that the Court of error has given the same judgment as ought to have been given by this Court, and the rule may, therefore, be absolute; but, of course, the Master will tax the costs according to the judgment of the Court of error, for we have no power over them.

Rule absolute.

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SIR JAMES GRAHAM, Bart., v. EWART.

THIS was a special case stated by consent, without pleadings, for the opinion of this Court.

The plaintiff's father was lord of a manor, within which

was a stinted pasture, and as such lord was owner of the soil and entitled to all mines and minerals and to other rights, royalties, liberties, and privileges upon and over it, and to the exclusive right of hunting, shooting, fishing, and fowling; but there was no right of free warren. The plaintiff's father and other persons were owners of tenements within the manor, and of shield rooms upon the pasture in respect whereof they were entitled to cattlegates and to rights of common of turbary. In 1811 an Act of Parliament was passed for inclosing the pasture. This Act recited that the plaintiff's father was lord of the manor; that there was within the manor the said stinted pasture; that he as lord was owner of the soil and entitled to all mines and minerals and to other rights, royalties, liberties, and other privileges in and over it; and that he and other persons were owners of tenements within the manor and of shield rooms upon the pasture, in respect whereof they were entitled to cattlegates on it and to rights of common of turbary and other rights therein. The Act then recited that it would be of benefit to the persons interested if the pasture was divided and allotted severally amongst the persons entitled to cattlegates thereon, and proceeded to appoint commissioners for that purpose. The Act directed the commissioners to allot to the plaintiff's father as lord of the manor, his heirs and assigns, one twelfth part of the pasture "*in lieu of, and in full recompence and satisfaction for all his right and interest, as lord of the said manor, of, in, and to the soil of the residue of the said stinted pasture.*" The Act then directed that the residue of the pasture should be allotted to the plaintiff's father and other persons entitled to cattlegates, rights of common, and other rights upon it, and the allotments were declared to be freehold. The Act reserved to the plaintiff's father, and the lords of the manor for the time being, all mines under the pasture, and full powers were conferred on them for working the mines. The Act also provided that nothing therein contained should prejudice, lessen, or affect the right, title, or interest of the plaintiff's father, his heirs, &c., lords of the manor for the time being, in or to any seignories, royalties, rights, or services incident or belonging to such manor; but they should and might at all times thereafter hold and enjoy the same respectively, and all rents, services, fines, courts, &c., "*and also right of hunting, shooting, fishing, and fowling in, through, and over the said stinted pasture and every part and allotment thereof*"; and all other seignories, royalties, and privileges to the lords of the said manor for the time being incident and belonging (other than and except those which were expressly declared to be barred, destroyed, and extinguished by that Act) *in as full, ample, and beneficial a manner as they respectively could or might have held and enjoyed the same in case this Act had not been passed.*" In 1814 an allotment in the pasture was made to the plaintiff's father in respect of an estate called Woodside, and an allotment called the Clint allotment was made to J. E. in respect of a customary tenement. In 1823, the plaintiff's father agreed with the defendant's grandfather to exchange the Woodside allotment for an allotment belonging to the latter. This exchange was effected by two deeds, dated the 1st of February, 1823. One of these deeds was made between the plaintiff's father and the plaintiff of the one part, and J. E. of the other part; and by it the former conveyed to the latter the Woodside allotment with a reservation to them and the lords of the manor of the mines and minerals, and also the liberty and privilege of hunting, hawking, coursing, shooting, fishing, and fowling over the said tenement, &c. By the other deed, which was between the same parties, J. E. conveyed to the plaintiff's father the land by him agreed to be given in exchange for the Woodside allotment, and he granted to the plaintiff's father and the lords of the manor the same right of sporting, and he covenanted to allow them to proceed against trespassers in his name. In 1829 the Woodside allotment came by descent to the defendant's father, and in 1846 he purchased the Clint allotment. Since 1831 the owner of these allotments sported over them, claiming to do so as of right, and the plaintiff

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The plaintiff is the lord of the manor of Nicholforest, in the parish of Bewcastle, in the county of Cumberland. The defendant is the son of Andrew Ewart, the owner of certain premises in the same manor, called Clint allotment and Woodside allotment.

Sir James Graham, Bart., deceased, the father of the plaintiff, before and at the time of the passing of the Bailey Hope Inclosure Act, which passed in the 51 Geo. 3, and is intituled, "An Act for inclosing Bailey Hope pasture in the parish of Bewcastle, in the county of Cumberland," was the lord of the said manor, and on his death, in 1824, was succeeded by the plaintiff, his son and heir.

The tenements held of the manor by the tenants thereof are customary estates, alienable by deed, surrender, and admittance, and descendible from ancestor to heir as of the hereditary right of the tenants, called tenant right; held of the lord of the manor for the time being, as of that his manor, by divers rents and certain fines, heriots, and services, according to the custom thereof, the soil and freehold of the manor being in the lord of the same manor.

At the time of the passing of that statute, there was within and parcel of the manor a tract of uninclosed land, being a stinted pasture, containing 4000 acres or thereabouts, called Bailey Hope; and Sir James Graham, as such lord, was then owner of the soil of Bailey Hope, and entitled to all mines and minerals within and under the same, and to other rights, royalties, liberties, and privileges in and over the same, and, amongst others, to the exclusive right of hunting, shooting, fishing, and fowling in, through, and

during the same time exercised the right of shooting concurrently. In 1852 the defendant's father claimed the exclusive rights of sporting over the Woodside and Clint allotments, and the defendant did so with his authority.—*Held*: first, that the plaintiff had the exclusive right of hunting, shooting, fishing, and fowling over the Woodside allotment. Secondly, that he had no right of sporting over the Clint allotment, either exclusive of or concurrent with the owner of it. Thirdly, that the concurrent enjoyment of the right, for more than twenty years, by the owners of the allotments, claiming to do so as of right, did not deprive the plaintiff of his exclusive right.

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over Bailey Hope, and every part thereof. There was no right of free warren in or over any part of the said manor.

The said Sir James Graham and certain other persons were then respectively owners of tenements within the said manor, and also of shieldrooms upon Bailey Hope, in respect whereof they, or their lessees or tenants, were entitled to divers cattlegates on Bailey Hope, and to rights of common of turbary. A copy of that statute is to form part of the case.

On the 3rd of June, 1814, an award was duly made under the said Act for dividing and allotting Bailey Hope, and was afterwards duly deposited. By this award an allotment was made to Sir James Graham, in respect of an ancient estate belonging to him called Woodside, which allotment adjoins the ancient estate, and contains 158A. 2R. 14P. And an allotment was made to one John Ewart, of Know, in respect of an ancient customary tenement belonging to him, called Holm Foot, which allotment contains 34A. 3R. 0P., and has since been called the Clint allotment. This last allotment was purchased by the defendant's father in 1846.

On the 1st of February, 1823, John Ewart, of Walby, grandfather of the defendant, purchased the Woodside ancient estate; together with its allotment, from Sir James Graham; and on that occasion certain indentures of the last-mentioned date were executed, to which Sir James Graham, deceased, the plaintiff, and the last-mentioned John Ewart, were parties. These deeds are to form part of the case (a).

(a) The material parts of these deeds are as follows:—

This indenture, made the 1st of February, 1823, between Sir James Graham, Bart, and James Robert George Graham, (the plaintiff) of the one part, and John Ewart (the defendant's grandfather) of the other part:

Whereas Sir James Graham and James R. G. Graham, being possessed of, and having the absolute power of appointment over, the messuage and tenement and other hereditaments first herein-after mentioned; and the said John Ewart being possessed of the plot, parcel, or allotment of

On the 16th of November, 1852, Andrew Ewart sent the following letter to J. Armstrong, a gamekeeper of the plaintiff:—

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ground and other hereditaments secondly hereinafter mentioned, they have agreed to exchange their several hereditaments, with the exception and reservation hereinafter mentioned, the said John Ewart having also agreed to enter into certain covenants contained in the indenture of lease hereinafter referred to, as bearing even date with these presents: Witnesseth, that, in consideration of and in exchange for the lands secondly hereinafter mentioned, &c., Sir J. Graham and J. R. G. Graham have granted, bargained, sold, assigned, released, and set over, &c., unto the said J. Ewart, all that messuage, tenement, and farm called Woodside, situate in the manor of Nicholforest, &c., and also the several closes, inclosures, or parcels of ground and allotments of common occupied therewith, &c., "except and always reserved unto the said Sir J. Graham and J. R. G. Graham, and the lord or lords of the manor of Nicholforest, in the county of Cumberland aforesaid, all and all manner of mines and quarries of coal, clay, freestone, limestone, and ironstone," &c., "and also except and always reserved unto the said Sir J. Graham and J. R. G. Graham, their heirs and assigns, and the lord or lords of the said manor of Nicholforest for the time being, the liberty and privilege of hunt-

ing, hawking, coursing, shooting, fishing, and fowling, with their companions, gamekeepers, and servants, in and over the said messuage, tenement, and other hereditaments hereinbefore mentioned and hereby surrendered, &c., unto and to the use of the said J. Ewart, his heirs and assigns; and also all free warrens, waifs, estrays, deodands, escheats, forfeitures for felonies, or any other capital crimes, and the goods and chattels of felons, felons of themselves, fugitives, and outlawed persons, and all royalties whatsoever, to the lords of the manor of Nicholforest now or at any time belonging." Habendum, unto and to the use of the said J. Ewart, his heirs and assigns for ever, in lieu of and in exchange of the plot, parcel, or allotment of ground and other hereditaments hereinafter particularly mentioned. [The deed then described the allotment to J. Ewart of part of the Bailey Hope pasture, which he agreed to give in exchange.]

The other indenture, which was also dated the 1st of February, 1823, was between J. Ewart of the one part, and Sir J. Graham and J. R. G. Graham of the other part; and after reciting that J. Ewart was seised in fee of the allotment in Bailey Hope pasture, and that Sir J. Graham and J. R. G. Graham were possessed of the Woodside farm and

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"MIRE, November 16, 1852.

"Sir,—Andrew Ewart being legally advised, that, as the proprietor of the estate of Holmhead, Woodside, and Clint,

allotment, and that they had agreed to exchange them, it was witnessed that J. Ewart granted, bargained, sold, &c. to Sir J. Graham and J. R. G. Graham, the allotment of the Bailey Hope pasture: Habendum, to the use of Sir J. Graham for life, and after his decease to the use of J. R. G. Graham, his heirs and assigns for ever, in exchange for the Woodside farm and allotment; except and reserving to Sir J. Graham and J. R. G. Graham, the lords of the manor of Nicholforest, the mines and quarries &c., and the liberty of hunting, &c. over that farm and allotment. The indenture also contained the following covenants on the part of J. Ewart:—"That it shall and may be lawful to and for the said Sir J. Graham and J. R. G. Graham, their heirs and assigns, companions and gamekeepers, and the lord or lords of the manor of Nicholforest for the time being, and such other person or persons as the said Sir J. Graham and J. R. G. Graham, their heirs and assigns, shall from time to time permit or suffer, to enter into and upon the messuage, tenement, and other hereditaments by the said indenture &c. intended to be conveyed to the said J. Ewart, his heirs and assigns; and also into and upon all that his the said J. Ewart's messuage, tenement, and lands, called Holmhead, situate, lying, and being in the manor of

Nicholforest, in the county of Cumberland aforesaid, and the allotment of common adjoining or allotted thereto, and to exercise the right or liberty and privilege of sporting and killing game thereon, without the lawful interruption of the said J. Ewart, his heirs and assigns, and at their, some or one of their, own costs and charges in the law to commence, prosecute, and manage any actions and suits at law or in equity, or any prosecution before a magistrate or magistrates in their or any of their names, or in the name or names of the said J. Ewart, his heirs or assigns, or of his or their tenant or tenants, farmer or farmers, for the time being of the said several premises, or any part thereof, or otherwise, as the said Sir J. Graham and J. R. G. Graham, their heirs or assigns, or the lord or lords of the said manor of Nicholforest for the time being shall think proper, against any person or persons sporting and killing game in the same messuages, tenements, and lands, or any part thereof; and also in such name or names, or otherwise as aforesaid, to defend any such action, suit, or prosecution: and also, that he the said J. Ewart, his heirs or assigns, or his or their tenant or tenants, farmer or farmers as aforesaid, shall not nor will release any such action or suit, or withdraw any such prosecution, without

he, according to the new Act entitling every proprietor to the exclusive right of disposing of his own game in the manner which seems most pleasing to himself, making null and entirely inoperative the Old Inclosure Act, under which the common and Bailey Hope was originally divided, is authorised to discharge from the above said grounds any of Sir James Graham's gamekeepers, whomsoever the Right Honourable Baronet may think fit to appoint for that purpose. I therefore inform you, that if you are found trespassing and in pursuit of game, or training dogs on the said commons appertaining to Holmhead, Woodside, and Clint, you will, after this notice, be prosecuted with the utmost rigour of the law.

ANDREW EWART."

Since the year 1831, the owners of several of the allotments made as aforesaid have shot and sported over those allotments, claiming to do so as of right. The defendant has shot and otherwise sported over the said Woodside and Clint allotments, with the authority of the owners thereof. The lord has exercised the right of shooting since 1831, but concurrently with the owners of the said allotments.

the consent of the said Sir J. Graham and J. R. G. Graham, their heirs or assigns, to be signified by some writing under their, or some one of their, hands or hand: also shall and will sign and give notice or notices to such person and persons as the said Sir J. Graham and J. R. G. Graham, their heirs or assigns, the lord or lords of the said manor of Nicholforest for the time being shall desire, to discharge them from trespassing, shooting, or sporting upon the same premises: and also shall and will give notice of every entry or trespass to the said Sir J. Graham and J. R. G.

Graham, their heirs or assigns or the lord or lords of the said manor of Nicholforest for the time being: Provided always, and it is hereby agreed and declared between and by the said parties to these presents, that nothing herein contained shall be construed to be a waiver or release by the said Sir J. Graham and J. R. G. Graham, or either of them, of any right of free warren to which they may now be entitled over the several premises, under and by virtue of any grant or grants, or otherwise howsoever."

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The Court is to draw any inferences that a jury would be authorised to do. The writ in the action was sued out on the 24th of January, 1853.

The questions for the opinion of the Court are: Has the plaintiff the exclusive right of hunting, shooting, fishing, and fowling, or either of those rights, over the said allotments, or either of them, and, if either, on which? Has the plaintiff a concurrent right as above? Has the defendant disturbed the plaintiff in the enjoyment of his said rights, or either, and which of them? If the opinion of the Court shall be in favour of the plaintiff in respect of either of the said rights, and that the defendant has disturbed him in the enjoyment thereof, then judgment is to be entered for the plaintiff for 40*s.* damages and costs; otherwise, for the defendant.

Cowling argued for the plaintiff (May 5 and June 11).—The plaintiff has the exclusive right of shooting, fishing, and fowling over both the allotments. As regards the Clint allotment, the case depends on the construction of the 51 Geo. 3 (*a*), for inclosing Bailey Hope pasture. That Act be-

(*a*) In addition to the clause set out at p. 335, the material parts of this statute (which is not printed) are the following:—

“Whereas Sir James Graham, Bart, is lord of the manor of Nicholforest, in the parish of Bewcastle, in the county of Cumberland, and there is within and parcel of the said manor a stinted pasture called Bailey Hope, containing, by estimation, 4000 acres or thereabouts; and the said Sir James Graham, as such lord of the said manor, is owner of the soil of the said stinted pasture, and is entitled to all mines and minerals within

and under the same, and to other rights, royalties, liberties, and privileges in and over the same: And whereas the said Sir James Graham, and certain other persons, are respectively owners and proprietors of messuages, lands, or tenements within the said manor of Nicholforest, and also of shieldrooms upon the said stinted pasture, in respect whereof they or their lessees or tenants are, or claim to be, entitled to divers cattlegates on the said stinted pasture, and to rights of common of turbary and other rights thereon. And whereas the said stinted pas-

gins by reciting that the father of the plaintiff was lord of the manor, and, as lord, was owner of the soil of Bailey

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ture is in its present state incapable of any considerable improvement, and it would be of great benefit to the persons interested therein, if the same was divided and allotted in severalty amongst the persons entitled to cattlegates thereon, according to their respective rights, but which cannot be effected without the authority of parliament," &c.: Be it enacted, &c. [The Act then provides for the appointment of commissioners, who (after setting out highways) are, in the first place, to allot such part of the said stinted pasture as shall be sufficient to defray all necessary expenses; they are then to allot parts of the pasture for public free-stone quarries.]

"And be it further enacted, that the said commissioners shall, and they are hereby required, in the next place, to allot, set out, and award unto and for the said Sir James Graham, as lord of the said manor of Nicholforest, his heirs and assigns, such part of the said stinted pasture as shall (quantity and quality considered) be equal to one full twelfth part or share thereof (after setting out the public roads and highways in manner directed by the said recited Act (41 Geo. 3, c. 109), and after making the allotment or allotments for sale hereinbefore directed to be made for payment of the expenses incurred and to be incurred in the execution of this Act, and also for public stone quarries as aforesaid), in lieu and

full recompense and satisfaction for all his and their right and interest as lords of the said manor, of, in, and to the soil of the residue of the said stinted pasture.

"And be it further enacted, that after such several allotments as hereinbefore and in the said recited Act are mentioned shall have been made, the said commissioners shall appoint, set out, divide, and allot all the residue of the said stinted pasture unto, between, and amongst the said Sir James Graham and the several other persons entitled to cattlegates, right of common or other right upon the said stinted pasture, for or on account of their messuages, lands, tenements, or shieldrooms, according and in proportion to their respective rights and interests therein (videlicet) according to the number of stints attached to such several tenements and shieldrooms.

"And be it further enacted, that from and after the award directed to be made in pursuance of this and the said recited Act shall have been executed by the said commissioners, and deposited, all and every the allotments hereinbefore directed to be made shall be and are hereby declared to be freehold to all intents and purposes whatsoever: Provided always, and be it further enacted, that, notwithstanding the division and inclosure hereby authorised to be made, the said Sir James Graham, his heirs and assigns, lords

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Hope, and entitled to the mines and minerals, &c., and to other rights, royalties, liberties, and privileges in and over it. The rights are undefined, but other rights than those belonging to him as mere owner of the soil must have been intended, particularly as the word "privileges" is used; for a person cannot in strictness exercise a privilege over his own soil, except in the case of free warren. Therefore, the statute must mean rights or quasi rights consequent on his being lord, which may include the exclusive right of sporting. The Act then proceeds to recite the tenant rights, which relate to the enjoyment of the surface for other purpose than that of sporting. The Act then points

of the said manor of Nicholforest, for the time being, shall for ever hereafter be deemed and taken to be the owner or owners of all the mines of coal, lead, copper, tin, iron, and all other metals, mines, minerals, and ores of what nature or kind soever, within or under the several and respective parts of the said stinted pasture intended to be divided and inclosed as aforesaid (as well those not opened as those, if any, already opened), and shall have full power and authority to use and exercise all convenient ways, wayleaves, and liberties of laying, making, and repairing wagonways and other ways in, over, and along the said stinted pasture, and the several allotments thereof, and of searching for, winning, and working the said mines, minerals, and quarries, and loading and carrying away the coal, lead, copper, tin, iron, and all other metals, mines, minerals, and ores to be gotten thereon and thereout respective-

ly, and of making pits, shafts, pitrooms, heaprooms, drifts, levels, and watercourses, and erecting and using fire engines and other engines, and all other matters and things now in use or hereafter to be invented for the purposes aforesaid, or any of them, in, upon, through, or over the said stinted pasture, and the respective allotments thereof, and all other powers, privileges, and authorities, and to do or execute any necessary acts or things for all or any of the purposes aforesaid, in and over the same, in such and the like manner as if this Act had not been made, he the said Sir James Graham, his heirs and assigns, lords of the said manor of Nicholforest for the time being, making reasonable satisfaction for the damage to be done to the owner or owners of the said allotments in making or using the said works or any of them, or by exercising any of the powers or authorities aforesaid."

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out the mischief to be remedied, viz. the little benefit derived from the surface in its then state, as compared with that which might be derived from it if it were held in severalty. That has no reference whatever to the mines or the right of sporting, and it must be presumed that the remedy is co-extensive only. The Act then proceeds to appoint commissioners, who, after setting out highways, &c., are required to allot to the father of the plaintiff, as lord of the manor, one twelfth part of the stinted pasture, in satisfaction of his right as lord of the soil, and to allot the residue amongst the father of the plaintiff and the other persons entitled to cattlegates, &c., and other rights upon it; and the allotments are declared to be freehold. Then follows a reservation to the lords of the manor for the time being of all mines and minerals, and full powers are given for working the mines. The Act concludes by providing, "That nothing herein contained shall prejudice, lessen, or defeat the right, title, or interest of the said Sir J. Graham, his heirs or assigns, lords of the said manor of Nicholforest for the time being, of, in, or to any seignories, royalties, rights, or services incident or belonging to such manor; but that the said Sir J. Graham, his heirs and assigns, shall and may, from time to time, and at all times hereafter, hold and enjoy the same respectively; and all rents, services, fines, courts, courts leet and baron, perquisites, and profits of courts, waifs, estrays, and forfeitures; and all coals, mines, minerals, ores, and metals whatsoever; and all powers of winning, working, and getting the same; and also right of hunting, shooting, fishing, and fowling in, through, and over the said stinted pasture, and every part and allotment thereof; and all other seignories, royalties, and privileges to the lords of the said manor of Nicholforest for the time being incident or belonging (other than and except those which are expressly declared to be barred, destroyed, and extinguished by this Act), in as full, ample, and beneficial a manner as they respectively could or might have held and

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enjoyed the same, in case this Act had not been passed." That clause should be construed with reference to the facts recited as then existing. It deals, first, with rights which strictly belong to the manor, such as seignories, &c. It then mentions rights not attached to the manor, but belonging to the lord solely as owner of the soil, such as the right to minerals, &c., and the right of sporting. The intention was to preserve all rights and privileges whatever belonging to the lord, other than those expressly declared to be barred. The sole object of the Act was to improve the cultivation of the surface, and the rights which the lord enjoyed above and below it were not interfered with. In *Wickham v. Hawker* (a), a similar reservation in a deed of conveyance was held to amount to a new grant. This right was acquiesced in as belonging to the lord until the passing of the Game Act, 1 & 2 Will. 4, c. 32, which it is said put an end to the right. That Act, however, expressly recognises and preserves such rights, ss. 8, 9, 10. *Greathead v. Morley* (b) is distinguishable, inasmuch as there it did not appear that the lord had any right of this description at the time the Inclosure Act passed, and the Court considered that if the statute had intended to give him new rights, words would have been used for that purpose, as was in fact done for the purpose of giving him the right of exclusively working the mines under the allotments.

With respect to the Woodside allotment, the right of the plaintiff stands on a different footing, because that allotment was made to the lord himself. It may be, that the operation of the statute was to suspend the right so long as the allotment belonged to the lord, but it was transferable like a right of free warren. In Com. Dig., tit. "Chase" (D), it is said, "A free warren is a privilege which a man claims by grant or prescription to have beasts of a warren in his land or demesnes, ita quod nullus intret ad fugandum

(a) 7 M. & W. 63.

(b) 3 M. & Gr. 139.

vel capiendum quod ad warrennam pertinet; 2 Rol. 812, l. 5 to 20. A warren is a privilege distinct from the land, and by a lease of the land, without more, does not pass.—Dy. 30, in marg. Nor, by an alienation of the land, without saying, cum pertinentiis: Dy. 30, b.” Here the indentures of the 1st of February 1823, contain an express reservation to the lords of the manor for the time being of the right of sporting; and there is a covenant on the part of Ewart to allow them to exercise the right without obstruction, and to prevent persons trespassing. Therefore the right is reserved, if it existed; if it did not, the language of the deeds amounts to a new grant.

Further, it is said, that the Plaintiff had lost the exclusive right of sporting, by reason of the concurrent exercise by the defendant since the year 1831. But the Prescription Act, 2 & 3 Will. 4, c. 71, has no bearing on this case. That Act applies only to the adverse enjoyment, as of right, of an easement over the land of another. A person cannot acquire any adverse right by the enjoyment of his own land. But even if the statute did apply, the right in question is a *profit a prendre*, and consequently the period of limitation is thirty years.

Pearson for the defendant.—First, when, by an Inclosure Act, the waste of a manor is divested from the lord, all rights incident to the soil are divested also. Here the lord was entitled to the right of sporting solely as owner of the soil. It is not like a right of free warren which may exist in gross: *Morris v. Dimes* (a). *Wickham v. Hawker* (b), shews that the right of shooting is not a right distinct from the soil. In *Doe d. Douglas v. Lock* (c), Lord Denman, in delivering the judgment of the Court, says, that “the privilege of hawking, hunting, fishing, and fowl-

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(a) 1 A. & E. 654.

(b) 7 M. & W. 63.

(c) 2 A. & E. 705, 743.

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ing, is not either a reservation or an exception in point of law; and it is only a privilege or right granted to the lessor, though words of *reservation and exception* are used. The saving clause in the 51 Geo. 3, does not give the lord any new right, but only reserves to him those which he before possessed: *Townley v. Gibson* (a), *Doe d. Lowes v. Davison* (b), *Greathead v. Morley* (c). If the legislature had meant to give the lord a right of sporting, words similar to those in the clause as to mines would have been inserted. There is nothing in this statute to create a right by implication, as in the cases of *Wainman v. Earl of Rosse* (d), and *Micklethwaite v. Winter* (e). The exception of "royalties" does not operate as a grant to enter upon the land for the purpose of killing game: *Pannell v. Mill* (f). The clause should be read as if it had stopped with the words "incident or belonging to such manor;" the following words, "but that," &c., do not convey any fresh right, but are merely in affirmance of that which is previously stated. The saving clause contains an exception with respect to rights expressly declared to be barred; and as the section declares that the allotments shall be freehold, the lord's right of sporting, which depended on the ownership of the soil, is barred.—He also referred to the 4 & 5 Vict. c. 35, s. 82, and 15 & 16 Vict. c. 51, s. 48.

Secondly, the plaintiff has, at the utmost, only a right of sporting concurrently with the defendant. The indentures of the 1st February, 1823, do not in terms reserve to the lord the *sole and exclusive* right. Where there is such a reservation, the tenant is excluded; but where merely the right of sporting is reserved, the tenant may exercise it concurrently with the lord. Since, therefore, the lord has only a concurrent and not an exclusive right, he cannot maintain this action against the defendant.

- (a) 2 T. R. 701.
 (b) 2 M. & Sel. 175.
 (c) 3 M. & Gr. 139.

- (d) 2 Exch. 800.
 (e) 6 Exch. 644.
 (f) 3 C. B. 625.

Thirdly, assuming that the effect of the statute and indentures was to reserve to the lord the right of sporting over the allotments in question, the plaintiff has lost that right by reason of the adverse user by the defendants for a period of more than twenty years. *Hawke v. Bacon* (a) decided, that twenty years adverse possession of a waste inclosed is a bar to the entry of a commoner. That doctrine was recognised in *Tapley v. Wainwright* (b), 1 Wms. Saund. 299 b, note (c), and by *Joy*, C. B., in *Dogherty v. Beasley* (c). [*Parke*, B.—The defendant has not lost his right of sporting by permitting the defendant to enjoy it concurrently with him, and the defendant has gained no right since he has not exercised an easement, for what he did was on his own soil.] The facts are sufficient to warrant a jury in presuming a grant.

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Cowling in reply.—The defendant's interpretation of the saving clause deprives it of all operation, while the plaintiff's gives effect to its language and is consistent with the authorities. The argument, that rights incident to the soil are alone reserved, is shewn to be incorrect by the reservation of the mines. The ordinary rights of a lord of a manor consist of demesnes and services: Com. Dig. tit. Copyhold (Q. 1). In addition, the lord may have, by grant from the Crown, royalties, as free warren, &c. His rights as owner of the soil may be, and usually are, modified, as in the case of cattlegates or rights of common, &c. These interests are always treated in Inclosure Acts as actual rights, though when they belong to the lord they cease to be such, and are merely modes of enjoying his own soil: *Arundell v. Viscount Falmouth* (d), *Lloyd v. Earl of Powis* (e). An Inclosure Act being a bargain between the lord and his tenants, it is important to refer to the preamble,

(a) 2 Taunt. 156.

(b) 5 B. & Ad. 395.

(c) 1 Jones's Ir. Exch. Rep. 123.

(d) 2 M. & Sel. 440.

(e) 4 E. & B. 485.

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since there the legislature recites what the parties considered as their respective rights. In *Townley v. Gibson* (a) the Inclosure Act, 17 Geo. 3, c. 79, by its recital, merely treated the lady of the manor as an ordinary owner of the soil, subject to rights of common; and the Act gave her compensation for her right to the soil, so that everything which the parties by the preamble had treated as a right being compensated for, she could have no claim to the mines; and the Court considered that the saving clause being read with reference to the preamble could only reserve royalties or services, if any. *Doe d. Lowes v. Davison* (b) was decided on the effect of an agreement and award confirmed by the statute 24 Geo. 2, c. 24, which was similar to that in *Townley v. Gibson*. Then came the 41 Geo. 3, c. 109, the 40th sect. of which reserved to the lord all rights and royalties belonging to him as owner of the manor. *Greathead v. Morley* (c) was decided on the 52 Geo. 3, c. 126. That Act treats the ownership of the soil and that of the mines, &c. as distinct rights, (sect. 1); and compensation is first awarded in respect of the soil (sect. 16). Therefore his rights as mere soil owner were put an end to; and the 37th section only reserved his rights as to seigniories, royalties, mines, and minerals. In this case the preamble of the 51 Geo. 3, includes any rights, or quasi rights, or privileges enjoyed by the lord, and those are preserved by the saving clause.

Cur. adv. vult.

The judgment of the Court was now delivered by

MARTIN, B.—This was a special case without pleadings, for the judgment of the Court. The case states as follows:—The plaintiff is lord of the manor of Nicholforest in the county of Cumberland. The father of the defendant is the

(a) 2 T. R. 701.

(b) 2 M. & Sel. 175.

(c) 3 M. & Gr. 139.

owner of two parcels of land within the manor, called the Clint allotment and the Woodside allotment, and the defendant claimed to shoot game upon them under his authority. In and previous to the year 1811, the father of the plaintiff was lord of the manor, and there was within and parcel of it a tract of uninclosed land, called Bailey Hope, being a stinted pasture, containing about 4000 acres; and the case states, that, as such lord, he was owner of the soil of Bailey Hope, and entitled to all mines and minerals within and under it, and to other rights, royalties, liberties, and privileges, &c. upon and over it, and amongst others, to the exclusive right of hunting, shooting, fishing, and fowling: but there was no right of free warren. The father of the plaintiff and various other persons were owners of tenements within the manor, and of shieldrooms upon Bailey Hope, in respect whereof they and their tenants were entitled to cattlegates upon it, and to rights of common of turbary. These tenements were held of the manor as customary estates alienable by deed, surrender, and admittance, and descendible from ancestor to heir, and were called tenant right, and held of the lord and of his manor by rents, &c., according to the custom, the soil and freehold of the manor being in the lord.

In the year 1811, an Act of Parliament passed, intituled "An Act for inclosing Bailey Hope pasture," which begins by reciting what has been above stated, viz. that the father of the plaintiff was lord of the manor; that there was within and parcel of it the said stinted pasture, called Bailey Hope; that he as lord was owner of the soil, and entitled to all mines and minerals, and to other rights, royalties, liberties, and privileges in and over it; and that he and other persons were owners of tenements within the manor, and of shieldrooms upon Bailey Hope, in respect whereof they were entitled to cattlegates on it, and to rights of common of turbary and other rights thereon. The Act then recited that it would be of benefit to the persons

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interested if the Bailey Hope was divided, and allotted in severalty amongst the persons entitled to cattlegates thereon, according to their respective rights, and proceeded to appoint commissioners for surveying, dividing, and allotting it. The Act contained the provisions usual in such Acts, and enacted that the commissioners (after setting out the necessary roads and highways) should allot a portion of the stinted pasture to be sold, in order to defray expenses, and that they should allot to the father of the plaintiff, as lord of the said manor, his heirs and assigns, such part thereof as should be equal to one twelfth part or share, *in lieu of and in full recompence and satisfaction for all his right and interest as lord of the said manor, of, in, and to the soil of the residue of the said stinted pasture.* The Act then enacted, that the residue of the said stinted pasture should be allotted to and amongst the father of the plaintiff and the several other persons entitled to cattlegates, rights of common, and other rights upon it, according and in proportion to their respective rights and interests therein; that is to say, according to the number of stints attached to their tenements and shield-rooms; and all the allotments so made were, after the award was perfected, declared to be freehold, to all intents and purposes. The Act further enacted, that, notwithstanding the inclosure, the father of the plaintiff, his heirs and assigns, lords of the said manor for the time being, should for ever thereafter be deemed and taken to be the owner or owners of all the mines of coal, lead, copper, tin, iron, and all other metals, mines, minerals, and ore whatsoever, within and under the said stinted pasture; and very full and extensive powers were conferred upon them for working such mines and carrying away the produce. It then provided that the owner of the allotments might take any quantity of lime or other stone from their respective allotments, to be used within the manor; and towards the end enacted as follows:—"That nothing herein contained

shall prejudice, lessen, or defeat the right, title, or interest of the said Sir James Graham, his heirs or assigns, lords of the said manor of Nicholforest for the time being, of, in, or to any seigniories, royalties, rights, or services incident or belonging to such manor; but that the said Sir James Graham, his heirs and assigns, shall and may, from time to time, and at all times hereafter, hold and enjoy the same respectively, and all rents, services, fines, courts, courts leet and baron, perquisites and profits of courts, waifs, estrays, and forfeitures, and all coals, mines, minerals, ores, and metals whatsoever, and all powers of winning, working, and getting the same, *and also right of hunting, shooting, fishing, and fowling in, through, and over the said stinted pasture, and every part and allotment thereof*; and all other seigniories, royalties, and privileges to the lords of the said manor of Nicholforest for the time being incident or belonging (other than and except those which are expressly declared to be barred, destroyed, and extinguished by this Act), *in as full, ample, and beneficial a manner as they respectively could or might have held and enjoyed the same in case this Act had not been passed.*"

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In 1814 the award was duly made and published, and an allotment was thereby made, to the father of the plaintiff, of 158 acres and upwards in the Bailey Hope, in respect of an ancient estate belonging to him, called Woodside. An allotment was also made to one John Ewart, in respect of an ancient customary tenement called Holme Foot: this has since been called the Clint allotment.

In 1823 the father of the plaintiff and the plaintiff, and the grandfather of the defendant, agreed to exchange the allotment made in respect of Woodside for land belonging to the latter, and two deeds were executed, dated the 1st of February in that year, for the purpose of effecting the exchange. One of these deeds was made between the father of the plaintiff and the plaintiff of the one part, and the said John Ewart of the other part; and after reciting the

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agreement for the exchange, and conveying the Woodside allotment to the said John Ewart in the usual manner, there was "excepted and always reserved unto the father of the plaintiff and the plaintiff, and the lord and lords of the said manor, all and all manner of mines and quarries," &c.; and also unto the said Sir James Graham (the father) and James Robert George Graham (the plaintiff), their heirs and assigns, lord or lords of the said manor of Nicholforest for the time being, the *liberty and privilege* of hunting, hawking, coursing, shooting, fishing, and fowling, with their companions, gamekeepers, and servants, in and over the said messuage, tenements, &c.; and also all free warrens, waifs, estrays, deodands, escheats, forfeitures for felonies or any other capital crimes, and the goods and chattels of felons, felons of themselves, fugitives, and outlawed persons, and all royalties whatsoever, to the lord of the said manor of Nicholforest now, or at any time heretofore, belonging." The other deed was between the same parties, and thereby the said John Ewart conveyed to the father of the plaintiff and to the plaintiff the land by him agreed to be given in exchange; and the said John Ewart *granted to the said Sir James Graham and the plaintiff, their heirs and assigns, companions, and gamekeepers, &c., the right, liberty, and privilege of sporting and killing game on the Woodside allotment, without the lawful interruption of the said John Ewart, his heirs or assigns;* and power was given to the plaintiff and his father to bring actions and to take proceedings before magistrates in the name of the said John Ewart, his heirs and assigns, against any person sporting and killing game thereon; and it was covenanted that such action should not be released, or proceedings withdrawn, without the consent in writing of the plaintiff or his father, their heirs and assigns; and also that the said John Ewart, his heirs or assigns should give notice in order to discharge any person from trespassing, shooting, or sporting upon it, and also that they

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should give notice to the plaintiff and his father, their heirs or assigns, of every entry and trespass: and lastly, it was provided, that nothing therein contained should be a waiver or release of any right of free warren, to which the plaintiff or his father were in any manner entitled. Both these deeds were duly executed by all the parties to them. In 1829 the Woodside allotment came to the defendant's father by descent, and in 1846 he purchased the Clint allotment. Since 1831 the owners of these allotments shot within them and sported over them, claiming to do so as of right, and the plaintiff during the same time exercised the right of shooting concurrently. The defendant, before the commencement of the action, shot and sported over them, with the consent and by the authority of his father, then the owner. On the 16th of November, 1852, the defendant's father addressed a letter as follows to the gamekeeper of the plaintiff. [His Lordship read the letter: (ante p. 330).] On the 24th of January, 1853, the action was commenced.

The questions stated for the opinion of the Court are—
 First: Has the plaintiff the exclusive right of shooting, fishing, and fowling, or either of these rights, over the Clint and Woodside allotments, or either of them? Secondly: Has the plaintiff a concurrent right? Thirdly: Has the defendant disturbed the plaintiff in the enjoyment of his rights, or either of them? The Court is to draw any inference which a jury would be authorised to do, and judgment is to be given for the plaintiff or defendant, according to the opinion of the Court.

The case has been argued before us, and two points have been made on behalf of the defendant. First: That upon the true construction of the Act of Parliament and the deeds, the plaintiff has, at the utmost, only a right to shoot and sport concurrent with the owner of the allotment; and secondly, that by reason of the concurrent exercise of the right of shooting, as of right, since 1831 (upwards of twenty

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years before the commencement of this action), the plaintiff has lost his exclusive right, supposing him ever to have possessed it.

As to the first point—The Clint allotment and the Woodside allotment stand on different grounds. The right as to the Clint allotment rests exclusively upon the Act of Parliament, and that as to the Woodside allotment exclusively upon the deeds. The Clint allotment was made to the person under whom the defendant's father claims title, and whatever right the Act confers upon the allottee belongs to him. The Woodside allotment was made to the father of the plaintiff, and he, being lord of the manor and owner of the soil, thereby became absolute tenant in fee simple; and whatever right the plaintiff has now over or in respect of it, depends entirely upon the deeds of exchange.

As to the general law on the subject of game, no difference existed at the bar. Game are *feræ naturæ*, and the property in them is a temporary property, consequent upon the possession of the soil. So long as they remain upon a man's land, they belong to him; but when they run or fly out of it, his property is at an end and gone: *Sutton v. Moody* (a), *Churchward v. Studdy* (b). But it is competent by law for a man to grant to another and his heirs with servants or otherwise, the right to come upon his land and there exclusively hunt, fish, and fowl, and such a grant is a license of a profit à prendre; and if a man convey away his land reserving such a right, it is not a reservation or exception properly so called; but if the grantee execute the deed containing such a clause, it operates as a *grant*: *Wickham v. Hawker* (c). In the argument and judgment in that case, all the authorities will be found; and the result is, that such a grant creates an interest, which is in law denominated a tenement, within the definition of that word

(a) 1 *Ld. Raym.* 250.

(b) 14 *East*, 249.

(c) 7 *M. & W.* 63.

in Co. Litt. 20. a, being an inheritance issuing out of land, and exercisable within it.

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This case is directly applicable to the Woodside allotment. In the conveyance of it by the father of the plaintiff, *the* right of shooting, &c., not *a* right of shooting, &c., is reserved to him and his heirs; and in the conveyance by John Ewart, the same right is expressly granted to them in the largest and most express terms; and considering the covenant in regard to trespassers, we think it was the intention of the parties, as shewn by these deeds, to vest in the plaintiff and father, and their heirs, the exclusive right of shooting, &c.; and that, subject to the question arising upon the twenty years concurrent enjoyment, the plaintiff is entitled to maintain an action for damages against the defendant for infringing upon his right.

As to the Clint allotment, it stands upon a different ground altogether. If the question in this case were res integra, we probably should have thought the statute meant the lords to enjoy the exclusive right of shooting over Bailey Hope when inclosed, which de facto they enjoyed when it was uninclosed; but upon full consideration we are unable to distinguish the case as to it from the case of *Greathead v. Morley (a)*. That case also arose upon an Inclosure Act, and there was a proviso contained in it, substantially the same as in the present. The Court of Common Pleas were of opinion that the right of shooting, &c., over the allotments was lost to the owner of the manor, by reason of the soil and freehold being transferred by the operation of the Act, and the award to the allottees; that the ownership of the soil carried with it the right of shooting, &c.; and that the proviso did not operate to confer upon the lord any *new right*, which they seem to have considered essential to entitle the lord to the right.

There were several circumstances mentioned by the

(a) 3 M. & Gr. 103.

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learned counsel for the plaintiff as distinguishing that case from the present; but we think that, substantially, they are the same: and as it has been stated that it is the intention of both parties to take this case to a Court of error, we think it better to act upon the decided case; and as to the Clint allotment, to give our judgment for the defendant.

As to the second point made by the defendant, viz. that the twenty years concurrent enjoyment of the right of shooting, as of right, deprived the plaintiff of the exclusive right, supposing him to have had it, we think it is of no avail. Such enjoyment clearly created no easement, for a man cannot have an easement in his own soil. Any exercise of ownership over a man's own land is a direct enjoyment of his property by virtue of his dominion over it, and in no sense a liberty or easement: (see the judgment of *Tindal*, C. J., in *Greathead v. Morley*); and as to the argument that we ought to infer a deed of grant by the plaintiff or his father to the owner of the allotment, it would be impossible to do so. The letter of the plaintiff's father of the 16th November, 1852, puts his claim upon an entirely different ground, viz. the operation of the Game Act, 1 & 2 Will. 4, c. 32. It is right to add, that no reliance was placed upon this statute by the learned counsel for the defendant, and it is clear that its provisions in no way affect the question between the parties: see sects. 6, 7, 8, 9 & 10.

Our answers to the questions put to us are—That the plaintiff has the exclusive right of shooting, fishing, and fowling over the Woodside allotment, but not over the Clint allotment, either exclusive or concurrent with the owner of it; and that the defendant has disturbed the plaintiff in the enjoyment of his exclusive right of shooting on the Woodside allotment. The result is, that judgment is to be entered for the plaintiff with 40*s.* damages as regards the Woodside allotment, and for the defendant as to the Clint allotment.

We think it right to add, that, in our opinion, the exclusive right is to shoot game commonly so called, and that it does not extend to animals and small birds not of that description.

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Judgment accordingly.

KENNETT, Judgment Creditor v. THE WESTMINSTER IMPROVEMENT COMMISSIONERS, Judgment Debtor, MACKENZIE, Garnishee.

July 5.

THIS was a rule calling upon the plaintiff to shew cause why an order of *Martin*, B., whereby a certain debt due from one Mackenzie to the defendants was attached under the 61st section of the Common Law Procedure Act, 1854, (17 & 18 Vict. c. 125), should not be rescinded.

The Westminster Improvement Commissioners, incorporated by Act of Parliament, for the purpose of effecting certain improvements in Westminster, were empowered to borrow money on bond, and to advance money to builders for building purposes. By the condition of these bonds, all the bondholders were to be paid *pari passu*.

It appeared that the defendants were a public body, incorporated and acting under several Acts of Parliament (8 & 9 Vict. c. clxxviii, 10 & 11 Vict. c. cxxxi, 13 & 14 Vict. c. cii, and the 16 & 17 Vict. c. clxxvi), for the improvement of Westminster and for building Victoria-street; for which purposes they were empowered by those Acts to borrow money and grant loans to builders. In pursuance of such powers, the commissioners had, in the first instance, borrowed the sum of 50,000*l.*, for which they had given bonds under their common seal; and they had subsequently obtained a further loan of 201,000*l.* on bond, the bondholders in the latter case having a priority over the former holders. The defendants, having occasion for additional

The Commissioners advanced a certain sum to K., a builder. The

plaintiff sued the commissioners on one of their bonds; and they suffered judgment by default:—*Held*, that the debt due from K. to the commissioners was not such a debt as could be attached under the 61st section of the Common Law Procedure Act, 1854, for the plaintiff could not enforce immediate payment of his judgment, and the effect of the garnishment would be to give him a priority over the other bondholders.

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capital, came to an arrangement by deed with the first class of bondholders for the further loan of 150,000*l.* upon the terms, that all the creditors of both the above-mentioned classes should be included in one general mortgage of all lands of the commissioners, and that all the present and future bondholders should be paid *pari passu*. The claims of the bondholders amounted to 700,000*l.* This arrangement was legalised and confirmed by the 75th section of the "Westminster Improvement Act, 1853," (16 & 17 Vict. c. clxxvi.) (a) The plaintiff had sued the defendants upon several of their bonds, given to him for certain advances, and they had suffered judgment by default for 6692*l.* 1*s.* The bonds were subject to the following conditions:—

"Provided always, that the lands, tenements, money, property, and effects of the said commissioners, acquired and to be acquired under or for the purposes of the said Acts or any of them, shall alone be answerable to pay and satisfy the principal sum and interest secured by the above-written bond, and that no commissioner or other person shall in any case be personally liable to pay the same principal and interest or any part thereof. Provided also, that the above-written bond is granted by the said commissioners to the

(a) That section is as follows:—"And whereas, pursuant to a power in that behalf contained in the Westminster Improvement Act, 1850, the commissioners have executed an indenture, dated the 26th day of May, 1852, for securing the performance of the condition of bonds granted pursuant to a certain deed of settlement of even date therewith, and therein referred to: And whereas the said indenture of mortgage affords an improved security to persons lending money to the commis-

sioners, and the powers and provisions contained therein, and in the said deed of settlement, will promote the advantageous letting of the land of the said commissioners, and will facilitate the completion of the undertaking: Be it enacted, that all and every the powers, provisions, and agreements contained in the said deed of settlement and indenture of mortgage, bearing date respectively the 26th day of May, 1852, except as hereinafter provided, shall be and are hereby confirmed."

intent that it may be entitled to the benefit of an indenture of mortgage, dated the 26th day of May, 1852, executed by the said commissioners under the authority of the above-mentioned Acts, and may be subject to the powers and provisions of an indenture of settlement of the same date, referred to in the said indenture of mortgage." The debt due to the commissioners which the plaintiff sought to attach was in respect of money advanced to Mackenzie, a builder, under the provisions of their Acts.

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Bramwell and *Keane* shewed cause (May 22).—There is no ground for the objection, that this debt cannot be attached under the 61st section of the 17 & 18 Vict. c. 125. The first objection, on the part of the defendants, is that the plaintiff cannot issue execution upon his judgment against the commissioners. But in the *Eastern Union Railway Company v. Hart* (a), it was held by the Court of error, affirming the judgment of this Court, that where a corporation is created for certain purposes, with power to sue and be sued, to borrow money for the completion of those purposes, and to secure the repayment of such money by an instrument which on its face imports a covenant for repayment, if money be so borrowed and so secured an action may *primâ facie* be maintained against the corporation on breach of the covenant. It will be further objected, that by the arrangement which was entered into between the bondholders and the commissioners, and which has been sanctioned by the legislature, all the bondholders must be paid *pari passu*, and that the effect of this proceeding would be, to give the plaintiff a priority over the other bondholders. But that arrangement does not apply to the individual bondholders, but to the different classes of bondholders; for, as the bonds are not of even date, it is clear that the payment of a bond of an early date cannot be postponed till the time for payment of all the bonds has ar-

(a) 8 Exch. 116.

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rived. [*Alderson, B.*—The main objection to this form of proceeding is, that the commissioners are not personally liable, but are mere trustees, and that a Court of equity is the proper tribunal for adjusting the claims of the bondholders.] The defendants have suffered judgment by default; and therefore that objection is not now open to them. They cannot dispute the title to this debt. They ought to have applied to a Court of equity in the first instance. Execution follows upon a judgment purely as a legal incident.—They referred to *Horton v. Westminster Improvement Commissioners* (a), *Doe d. Banks v. Booth* (b), and *Bolckow v. Herne Bay Pier Company* (c).

Bovill and *L. Smith* in support of the rule.—This proceeding is not within the meaning of the 61st section of the 17 & 18 Vict. c. 125. First, the debt of the garnishee is not a debt due to the defendants in their *personal* character: they are mere trustees appointed and acting under these Acts of Parliament, for the purpose of effecting certain improvements. They are not personally responsible for their debts, and it is their duty to see that the money borrowed is properly applied to the purposes contemplated by the Acts. This appears from the 45th section of the 8 & 9 Vict. c. clxxviii. That section enacts "that all the money which shall be raised under the authority of this Act shall be applied, in the first place, in paying the expenses of obtaining and passing this Act or incident thereto, and afterwards in making such new street and other permanent improvements connected therewith as are hereby authorised, and as the commissioners under this Act shall direct to be made, and in or towards payment of the mortgages and charges from the time being existing under the authority of this Act, and in or towards answering other purposes of this Act; and the surplus shall be applied in manner here-

(a) 7 Exch. 780.

(b) 2 Bos. & P. 219.

(c) 1 E. & B. 81.

inafter directed." It was never intended that the provisions of the 61st sect. of the 17 & 18 Vict. c. 125, should be applicable to a debt due to a trustee. *Westoby v. Day* (a), and *Halket v. Merchant Traders' Society* (b) are authorities that the statute does not apply to cases where the judgment debtor cannot sue the garnishee personally, but only in a corporate capacity.

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Secondly, if the money had been paid over by the garnishee to the defendants they would have been guilty of a breach of trust in paying it over to the plaintiff, as all the bondholders must be paid *pari passu*. The plaintiff cannot gain any priority by his judgment, as against the other bondholders. And therefore, by the condition of the bond, to which the plaintiff's rights are subject, he is precluded from the remedy given by the 61st section of the 17 & 18 Vict. c. 125.—They also referred to *Dumville v. Ashbrooke* (c), *Pardoe v. Price* (d), and *Reg. v. Trustees of the Balby and Workop Roads* (e).

Cur. adv. vult.

PLATT, B., now said.—This was a rule to set aside an order of my Brother *Martin*, which attached a debt due from one Mackenzie to the defendants, the Westminster Improvement Commissioners. The commissioners were appointed for the purpose of carrying on certain public works, and in the course of those works it became necessary that they should borrow money upon their bonds. It was afterwards found convenient that an arrangement should take place among the bondholders for the purpose of regulating the mode in which these bonds should be paid; and one of the terms of that arrangement was, that no one bondholder should have priority over the others. Accordingly an arrangement was entered into, by which the bondholders agreed to be

(a) 2 E. & B. 605.

(b) 13 Q. B. 960.

(c) 3 Russ. 98, n.

(d) 11 M. & W. 427.

(e) 1 Bail C. Cas. 141.

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paid *pari passu*. The agreement was not only made by the commissioners, but the legislature, by the 16 & 17 Vict. c. clxxvi, s. 75, approved of and confirmed that arrangement. Therefore every bondholder can only be paid according to the terms of that agreement. The plaintiff sued the commissioners on one of the bonds and obtained judgment; and then, inasmuch as Mackenzie was indebted to the commissioners, the plaintiff applied for an order under the Common Law Procedure Act, 1854, to attach that debt. The learned Judge made an order, and the question is, whether that order ought to be rescinded. Now, the interference of the Judges in these cases of attachment is discretionary. It is not every debt due to a judgment debtor that is to be attached. The debt may be attended with circumstances which would prevent the judgment creditor from enforcing its immediate payment, and where such is the case it is not a debt of the nature contemplated by this Act. The object of the Act is plain. A person may not be able to pay his creditors by reason of not being paid what is owing to him; and therefore if judgment is obtained against him it is very reasonable that debts due to him should be attached for the purpose of relieving him from the burthen of the judgment. That is not the case here, because, by the condition of the bond, the property, and not the commissioners who executed the bond, is charged with the payment of it; and the agreement which was entered into between the commissioners and the bondholders gave to the plaintiff only a limited right to recover the money. Therefore the Court are of opinion that this is not such a debt as ought to have been attached, because the attaching it and compelling immediate payment would give a preference to the debt due to this particular bondholder over all the others, which is in direct violation of the agreement. The rule therefore must be absolute to set aside the order.

Rule absolute.

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HEATHCOTE v. WING.

June 23.

QUAIN had in last Easter Term obtained a rule, calling on the defendant to shew cause why judgment should not be entered up as of the 21st of April, 1854, nunc pro tunc.

It appeared that the action came on for trial at the York Spring Assizes, 1854, when a verdict was entered for the plaintiff, with 300*l.* damages, subject to a reference to arbitration. The order of reference contained a stipulation that it should not be revoked by the death of either of the parties previously to the making of the award, and that the order might be made a rule of Court. The plaintiff died on the 22nd of April, 1854, and his widow and executrix proved his will and obtained probate on the 24th of June following. The arbitrator (having twice enlarged the time) made and published his award in favour of the plaintiff on the 25th of November, directing that the verdict already entered for the plaintiff should stand, but that the damages should be reduced to a stated sum. The order of reference was made a rule of Court.

In March, 1854, at the Spring Assizes, a verdict was entered for the plaintiff, subject to a reference. In April following the plaintiff died. On the last day of Michaelmas Term, the arbitrator made his award, directing that the verdict for the plaintiff should stand:—*Held*, that, as by the 17 Car. 2, c. 8, an executor is entitled to two terms from the verdict to enter up judgment; and as the verdict was inchoate only till the award was made, and the executrix could not have entered up judgment in Michaelmas Term, an application in the following Easter Term to enter up judgment as of Easter Term, 1854, nunc pro tunc, was in time.

Deighton shewed cause in last Easter Term (May 4).—The application is too late. By the 139th section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), “the death of either party between the verdict and the judgment shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict.” If the time when the verdict was given at Nisi Prius, in March, 1854, is to be taken as the date of the verdict, the section referred to does not assist the plaintiff, for more than two terms have elapsed since that date. And if the time when the award was made is the time of the verdict, still this application is too late, for the award was

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made in Michaelmas Term, and judgment might have been signed in that term. [*Platt*, B.—It does not appear that the parties had notice at that time that the award was made. *Martin*, B.—If judgment had been signed at that time, the defendant would have objected it was too soon, as he ought to have four days in the Term to move to set aside the award. In *Jones v. Ive* (a), a cause, and all matters in difference between the parties, were referred by an order of *Nisi Prius*, by which a verdict was taken for the plaintiff, subject to an award; the costs of the cause to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator, by his award, ordered that the verdict entered for the plaintiff should stand, and directed that the defendant should pay to the plaintiff the costs of the reference and award. It was held that the plaintiff was not entitled to have an allocatur for the costs, or to sign judgment until the expiration of the proper time for moving to set aside the award.] *Cromer v. Churt* (b) is an authority for the defendant. There a verdict was taken by consent for the plaintiff at *Nisi Prius*, subject to the certificate of a barrister, to be given in the following Michaelmas Term, with power to enlarge the time for making it, and he enlarged the time till the following Easter Term; and in the month of March, gave his certificate, directing that the verdict should stand for a smaller amount. And it was held that final judgment might be signed *immediately* on the entry of this verdict on the *postea*, and that the plaintiff was not bound to wait until the expiration of the four first days of Easter Term. The established rule is, that the Court will not direct judgment to be entered *nunc pro tunc*, where two terms have elapsed since the verdict, unless the delay arises from the act of the Court: *Lanman v. Lord Audley* (c), *Evans v.*

(a) 10 C. B. 429.

(b) 15 M. & W. 310.

(c) 2 M. & W. 535.

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Rees (a) and *Freeman v. Tranah (b)*. [*Parke, B.*—In the latter case the Court recognised the rule of law relied upon by the plaintiff, but refused to grant the application, on the ground that the delay was the act of the party, and not of the Court. The law on this subject is to be found in 2 Wms. Saund. 720, note (b). The question is, whether the arbitrator can be considered as standing in the place of the Court, so that his act, in not having made the award before the 25th of November, can be treated as the act of the Court.] The arbitrator cannot be so treated, for he obtains his jurisdiction solely by the consent of the parties. And therefore the delay cannot in any sense be considered as the act of the Court.

Quain in support of the rule.—First, by the terms of the submission (i. e. by the contract between the parties) the death of either of them was not to revoke the reference: *Tyler v. Jones (c)*, *Lewis v. Winter (d)*. Secondly, the delay was the act of the Court, for an arbitrator is deputed by the Court, with the consent of the parties, to take the place of the Court and jury. As far as the cause is concerned, he has merely authority to direct that the verdict shall either stand or be set aside. But the verdict entered at *Nisi Prius* was a nominal verdict only, and therefore the 139th section of the Common Law Procedure Act does not apply, as the death of the plaintiff occurred before the complete verdict. The application depends upon the common law jurisdiction of the Court: *Brooke v. Fearn (e)*; and if the Court should hold, that this application ought not to be granted, the executrix is without remedy. [*Parke, B.*—She may sue upon the award.]

Cur. adv. vult.

(a) 12 A. & E. 167.

(b) 12 C. B. 406.

(c) 3 B. & C. 144.

(d) Cited in Russell on Awards,
609.

(e) 2 Dowl. P. C. 144.

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The judgment of the Court was now delivered by

PARKE, B.—This was an application on behalf of the executrix of a deceased plaintiff to enter judgment for the plaintiff as of Easter Term, 1854. The cause was tried at the Spring Assizes, 1854, and a verdict was taken for the plaintiff subject to a reference. The order of reference provided, that the death of either party should not be a revocation. The plaintiff died on the 22nd of April, 1854, and his executrix, the applicant, duly proved his will on the 24th of June, 1854. The arbitrator was duly appointed at the assizes, and made and published his award on the 25th of November, 1854. No judgment was signed in Michaelmas or Hilary Term, but in Easter Term a motion was made by Mr. *Quain* to be at liberty to enter a judgment nunc pro tunc. Cause was afterwards shewn, and the Court have now to decide whether the rule ought to be made absolute.

We take it to be perfectly settled that judgment is never given nunc pro tunc, except on the ground that the delay has been occasioned by the act of the Court. This was most distinctly laid down in the judgment of the Lord Chief Justice *Jervis* and Mr. Justice *Maule*, who strongly urges the propriety of administering justice on established rules, in the case of *Freeman v. Tranah* (a). In the case of *Evans v. Rees* (b), the Court of Queen's Bench laid down a rule, which is no doubt perfectly correct, that though the statute 17 Car. 2, c. 8, requires a judgment to be entered up in two terms after verdict, yet the Court is not fettered by that statute in its jurisdiction to enter judgment nunc pro tunc in a fit case. But the principle is still the same—it is only for a delay of the Court in doing justice that the judgment can be so entered.

The only question then is, has there been any delay of the Court which has prevented judgment being entered for

(a) 12 C. B. 413.

(b) 12 A. & E. 167.

the two terms since the verdict. The verdict, if the original taking of it is considered as the verdict and not the final conclusion of it by the making of the award, dates at the Spring Assizes, 1854, and consequently four terms, viz. Easter, Trinity, Michaelmas, and Hilary Terms, have elapsed. But there was no verdict at the assizes that could be acted on by signing judgment. It was incomplete till settled by the arbitrator, and we think two terms after a *complete* verdict are meant by the statute to be allowed, if the plaintiff dies after the verdict is inchoate. How then are the two terms to be estimated? Is Michaelmas Term, on the last day of which the verdict was complete by the award, to be considered as one? We have not been able to find any authority on this question, but it seems highly reasonable to hold that the statute of 17 Car. 2, means to give the executor two terms, during all or at least a part of which he could have entered up judgment; and the executrix certainly could not have entered up the judgment on the last day of Michaelmas Term, as there was no time for a rule for judgment to have been granted.

Therefore we think the executrix had the power to enter up judgment in Hilary Term and Easter Term, and the application, being made in Easter Term, was in time. Perhaps she might have signed it without leave of the Court, but the delay of the arbitrator might fairly be considered as the delay of the Court. Therefore the rule to enter the judgment as of Hilary or Easter Term, 1854, will be absolute.

Rule absolute.

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June 19.

BOYLE v. WISEMAN.

It is the province of the Judge at Nisi Prius to decide all preliminary questions of fact upon which the admissibility of the evidence depends.

In an action of libel, the plaintiff, in order to prove the publication of the libel, tendered secondary evidence of the contents of a letter written by the defendant. On the part of the defendant, a document was produced as the original:—*Held*, that the Judge was at that stage of the cause bound to hear the evidence on both sides, and to decide whether the document offered was the original or not; and that, if it was, the secondary evidence was inadmissible.

THIS was an action for a libel originally published in "The Univers," a French newspaper, and afterwards in "The Catholic Standard" and "The Tablet," two English newspapers (a). The case was tried twice, and the Court had, after the first trial, granted a new trial on the ground of the improper reception of evidence, and also on the ground that the testimony of the defendant had been improperly rejected. The cause was tried the second time before *Platt*, B., at the last Spring Assizes for Surrey, when it was sought to prove the publication of the libel in "The Univers" by giving secondary evidence of the contents of a letter written by the defendant to the Abbé Cognat, a Roman Catholic priest residing in Paris, and which letter was alleged to contain admissions implicating the defendant. The Abbé Cognat had refused either to give up the letter or to attend the trial and produce it. A witness called on the part of the plaintiff was requested to state the contents of the letter from memory, whereupon the defendant's counsel handed a document to the witness and asked him whether that was not the original letter, to which the witness replied that if it was it had been altered. It was then proposed, on the part of the defendant, to give evidence to shew that the document tendered was the original letter; and it was submitted, that on satisfactory proof of that fact the secondary evidence must be excluded. There had not been any notice to produce or to admit this letter. The learned Judge, however, ruled that the defendant could not at that stage of the cause give such evidence, but that he might do so

(a) See the report of the case, ante, vol. x., p. 647.

when his case came on. The cause proceeded, but the defendant did not tender any evidence, and a verdict was found for the plaintiff with 1000*l.* damages.

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Shee, Serjt., had obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a new trial had, on the ground that the evidence in question had been improperly rejected, and also of the damages being excessive.

Lush and *Raymond* (*E. James* with them) shewed cause.—The evidence tendered by the defendant during the progress of the plaintiff's case was properly rejected. The defendant had an opportunity of producing the document as part of his own case. The plaintiff was entitled to give secondary evidence of the contents of the letter. [*Parke*, B. —He had laid the foundation for the admissibility of secondary evidence. But such evidence is admissible only where the original is wanting, and consequently, on the production of the original, the secondary evidence was out of the question. It was for the Judge alone to decide whether the secondary evidence was admissible, and for that purpose he ought to have heard all the evidence. All collateral matters as to the admissibility of evidence are for the Judge and not for the jury.] *Jones v. Fort* (a) is a decision in the plaintiff's favour. There the plaintiff tendered an examination of the defendant taken before bankruptcy commissioners, and Lord *Tenterden* refused to allow the defendant to call witnesses to prove, before the examination was read, that it was incomplete and inadmissible; the learned Judge said, "I give no opinion on the effect of the evidence suggested; but I cannot admit it at present. The inconvenience of allowing the interposition of evidence

(a) Moo. & R. 2.

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out of its regular course would be very great." [Parke, B.—That decision cannot be treated as law. This point was considered in *Bartlett v. Smith* (a) where I referred to the case of *Major Campbell*, and to another case, where I was aware that the same point would most likely be raised before me on a trial for murder at York. In both cases all the Judges were of opinion that such matter was for the Judge only.] Suppose the plaintiff gives in evidence a document which he alleges is in the handwriting of the defendant and the defendant denies the fact, that would be a question for the jury. In *Whitehead v. Scott* (b), which was an action of trover for a deed, Lord Tenterden, C. J., held that the plaintiff might prove the nature and description of the document, though the defendant then offered to produce it, and that the defendant might produce it as part of his case. [Parke, B.—There no question as to secondary evidence was involved. The evidence given by the plaintiff was merely for the purpose of identification.]

Shoe, Serjt., *Bramwell*, and *Willes* appeared in support of the rule, but were not called upon to argue.

PARKE, B.—I am of opinion that the rule must be absolute. I entertain no doubt upon the question. On a trial at Nisi Prius, it is the sole duty of the Judge to decide any question of fact which may arise in the course of the inquiry, on which the admissibility of evidence depends. Now, the rule is, that secondary evidence is not admissible unless primary evidence cannot be procured; and before it can be admitted, it must be shewn that reasonable efforts have been made, and have proved unavailing, to procure the primary evidence. Such proof

(a) 11 M. & W. 483.

(b) Moo. & R. 2.

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was given in this case, for the plaintiff gave sufficient evidence to let in parol proof of the contents of the instrument, if the instrument itself had not been produced. But the defendant interposed by producing a document which he tendered as the original letter. Whether such was the fact was to be decided, for the mere statement of the defendant that it was is not sufficient, neither was the statement of the plaintiff's witness, that he saw the original letter, and that the document produced was not the original. There being these conflicting statements, the Judge was bound to hear evidence on both sides, and decide whether the document tendered by the defendant was the original. If he had decided that it was not, it would have been competent for the plaintiff to give the secondary evidence he offered, and the credit due to it would be for the jury. In such a case the Judge should hear the witnesses at length, for the purpose of deciding whether the document tendered is the original; and if he is of opinion that it is, that document alone must be read to the jury. This is the law as laid down by the Judges on the prosecution of *Major Campbell* (a), where they expressed the opinion, that, on a dying declaration being tendered in evidence, it was not competent to the Judge to leave it to the jury to say whether the deceased knew, when he made it, that he was at the point of death, as such matter must be decided by the Judge and not by the jury. The authority of that case has always been acknowledged, and it is now well settled that all these preliminary questions on which the reception of evidence depends ought not to be submitted to the jury for their consideration, but must be decided by the Judge himself.

ALDERSON, B.—I am of the same opinion. There is a material difference between the question whether a docu-

(a) 11 M. & W. 486.

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ment, which is an undisputed original, ought to have been received in evidence, and whether secondary evidence of a particular document ought to be received, on the ground that a document tendered as the original is not in fact the original. It appears to me, that it is upon the false analogy between these cases the fallacy of the argument turns. Where a deed is received in evidence, the deed is proved in the regular way by its production, and the party seeking to alter the effect of the evidence must give his proof when his turn comes, and the whole of the evidence must go to the jury. So, in such a case as occurred yesterday, where an old lady was said to have received love letters from a person against whom she brought an action for breach of promise of marriage, there was *primâ facie* evidence that those letters were in the handwriting of the defendant, and they were either the originals or forgeries; but, whether they were or were not was not a question of secondary evidence, and the defendant was therefore obliged to wait till his own case came on before he could prove the falsehood of her statement, by contradicting the evidence of her witnesses who deposed to the handwriting being his. The question of the genuineness of handwriting is for the jury, as a question of primary evidence. In both those cases it is primary evidence, but here the question is what evidence are the jury to *receive*, and not what evidence they are to *believe*. It is clear, that the plaintiff was seeking to give secondary evidence of a matter that existed elsewhere. Where was that document which was the primary evidence, and without the non-production of which secondary evidence was altogether inadmissible? The plaintiff's case was that it was in France. The defendant's case, that it was there in Court. Which is right? If the plaintiff's case is right, he is entitled to give the secondary evidence. If the defendant is correct, the secondary evidence is inadmissible. Who then is to determine whe-

ther that document is to be received at all? Surely not the jury, for they are only to judge upon the evidence when it is received. It is the duty of the Judge, and he must determine whether it ought to be received; and if for that purpose it is necessary that he should determine a question of fact, he must determine that question, and the party against whom the Judge decides has his remedy by applying to the Court to correct the error, if the Judge has decided wrongly. The question of fact must be submitted, first, to the Judge, and afterwards to the Court. If he receives the evidence, and the Court are of opinion that he ought not to have received it, his decision will be overruled. But there is no question for the jury as to the reception of the evidence, for their duty does not arise until after the evidence has been received.

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PLATT, B.—I greatly regret that by any mistake of mine (for I must now take it for granted that I was mistaken, though I am scarcely convinced on this point), and apart from the merits of the case, the plaintiff should have again failed. I must own that the point came suddenly upon me at the trial, and I was strongly impressed with the conviction that it was for the defendant to displace anything that was proved by a witness for the plaintiff. The plaintiff's witness stated that he saw a certain document, and that the document tendered was not the one he saw. It appeared that the person who shewed that document to him was not present at the assizes, and could not have given evidence directly against him. But putting that aside, it occurred to me that the mere production of a paper, which was said by the defendant to be that to which the witness adverted, ought not to be sufficient to induce me to try the question, whether it was or not. It struck me that the proper mode of proceeding was to take the evidence of the witness, *valeat quantum*, and then to let

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the defendant produce his witnesses, which, however, he did not do. If the defendant could have shewn satisfactorily that the witness for the plaintiff had been stating what was false, that would have defeated the plaintiff's case altogether. It seemed to me that that was the manly and straightforward mode of meeting the case. Some notice was given to the defendant of the intended production of this paper. The witness had been to Paris for the purpose of obtaining the original, either by receiving it, or by obtaining the attendance of the Abbé Cognat to produce the document himself. This was, however, refused. The evidence was under the dominion of the defendant, for he had the document here, though the plaintiff had no notice that it would be produced, and there was no notice to inspect and admit it. Whilst the witness was in the course of being examined, the letter was produced, and suddenly put into the witness's hand, but he positively stated that that letter was not the paper he saw. At the trial, I was very strongly impressed with the belief that I took the right course. However, I feel myself bound by the opinions of my brethren, who consider that I was wrong; and I concur with them in thinking that the rule must be absolute.

MARTIN, B.—The question, whether evidence which is tendered is admissible, is one of law. It is for the Judge to decide it, subject to the correction of the Court out of which the record comes, or of a Court of error; and the rule is equally applicable to the admissibility of secondary evidence. If a party produces what he alleges to be a copy of a document, and the opposite party then produces a document which he alleges to be the original, if that be true, the copy is not admissible; but the Judge must determine whether it is the original, and, so far as the jury are concerned, the document which has been read as a copy is not

before them. Whether a document is an original or a copy, is a question which may arise in the course of a trial, and may occasion great inconvenience; but such a consideration cannot affect the law. It has been stated, and with truth, that there are no degrees of secondary evidence; therefore, a copy and the statement by the party of the contents of a written document stand on exactly the same footing in point of law. It seems to me that the true rule requires the Judge to decide as to the admissibility of evidence, and if so, it follows as a necessary consequence, that he must try whether a document produced as the original, when secondary evidence is offered, is so or not. I agree that *Jones v. Fort* (a) is an authority in the plaintiff's favour; but I think it is erroneous, for I am of opinion that the Judge ought to have decided whether the examination of the defendant before the commissioners in bankruptcy was receivable in evidence, and to have heard the evidence tendered to shew that it was not. The case of *Whitehead v. Scott* (b) appears to me to be perfectly right. For the purpose of identifying anything, whether it be a writing or anything else, proof may be given to shew what it is. And therefore, in an action of trover for a promissory note, the contents of the promissory note may be stated verbally by a witness. The reason is, that the evidence is not given of the contents as evidence, but for the purpose of identification. Therefore, in an action of trover brought for a deed, as was the case in *Whitehead v. Scott*, the witness was properly asked to describe the indorsement on the back of it, or the contents of it, or any other matter, merely for the purpose of identification. In an action of trover for a cart, it might be identified by shewing the name of the owner and the description on the cart itself. *Whitehead v. Scott*, therefore, which

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(a) 1 Moo. & M. 196.

(b) Moo. & R. 2.

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involved the question as to the admissibility of evidence for the purpose of identification, wholly differs from that of secondary evidence which is given with a view of proving the contents of a written instrument, to shew its effect. For these reasons I am of opinion that my Brother *Platt* ought to have heard the evidence, and to have himself decided whether the letter tendered was the original or not.

ALDERSON, B., added:—It is better to state that the case of *Jones v. Fort* must now be considered as overruled, than to endeavour to distinguish it from the present case.

Rule absolute.

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June 23.

THIS was an action to recover damages for the injury to certain mills, manufactories, cottages, and premises of the plaintiff, caused by the diminished supply of water in consequence of the alleged unlawful acts of the defendant.

The declaration contained four counts. The first count was for the diversion of certain streams and watercourses from the premises of the plaintiff. The second count was

The owner of land has an unqualified right to drain it for agricultural purposes, in order to get rid of mere surface water, the supply of the water being casual and its flow follow-

ing no regular or definite course; and a neighbouring proprietor cannot complain that he is thereby deprived of such water which otherwise would have come to his land.

The land of the plaintiff and defendant was contiguous, and on the outside of the defendant's land, and near to it, was a wet springy spot, where at most seasons of the year some water rose to the surface, and collected in sufficient quantity to flow down the slope of the land. In times of wet a great body of water flowed down, and after a long drought there was hardly any, and sometimes none. There was no regularly formed ditch or channel for the water, the place where it flowed being constantly trodden in by cattle. The water which was not absorbed (and, except in times of drought, all of it was not absorbed) ran into an old watercourse of the plaintiff, which led into a reservoir of the plaintiff. The water had so flowed for upwards of twenty years. The defendant, for the purpose of draining his land, and of supplying some part of his property with water, diverted this water from the plaintiff's reservoir.

At another spot on the plaintiff's land, as long ago as any one could recollect, water had always risen to the surface. There had generally been a drinking place for cattle formed with stones, and the overflow of the water went down a ditch, and thence into a watercourse to the plaintiff's reservoir:—*Held*, that the defendant was not liable to the plaintiff for having deprived him of the use of such waters, he having diverted them by draining his land, for the purpose of getting rid of the water, and of supplying another portion of his property with it.

For upwards of twenty years water had flowed through an old drain on the defendant's land, and along an ancient watercourse, and thence along a close of the defendant, called G. B., and had thence contributed to supply the plaintiff's mills after their erection in 1845. In that year the defendant by deed conveyed to the plaintiff the close G. B., "together with all ways, watercourses, liberties, privileges, rights, members, and appurtenances to the same close belonging or appertaining," subject to the proviso, that it should be lawful for the defendant to use, for any manufacturing, domestic, or agricultural purposes, any water flowing from or through the contiguous lands of the defendant unto and into the close G. B., returning the surplus, or so much as remained, after being used for the purposes aforesaid, into its usual channel at certain point, so that the water should not be diverted from its then course, but be allowed to flow into the close G. B. The defendant erected a lock-up-tank upon his land, and caused the water which arose on his land, near to the close G. B., and which had previously been accustomed to flow along the old drain and ancient watercourse into the close G. B., and he caused the water to be conveyed from the tank to a lower part of his land, to be used by his tenants. This water was used by them for the purposes mentioned in the proviso to the deed, but the surplus could not be returned to the close G. B.

Held, that by the deed the defendant granted to the plaintiff the use of the water, subject only to the use by himself of it as specified in the proviso; and that, by locking it up, he had diverted it, and was liable to an action for a breach of his covenant, by reason of such diversion.

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for cutting and making certain pipes and drains near to streams and watercourses which ought to have supplied the mills and premises of the plaintiff, and so preventing water from flowing and percolating, under ground and on the surface, in its natural and ordinary course into those streams and watercourses, whereby the supply of water to the premises of the plaintiff had been diminished. The third count was for laying pipes and drains by the defendant in his own lands, and so preventing the flow and percolation, from the lands of the defendant to those of the plaintiff, of water which the plaintiff alleged he was entitled to, and which would have flowed to his mills and manufactories. The fourth count was as follows:—And the plaintiff also sues the defendant, for that by a certain deed bearing date the 11th day of August, A. D. 1845, sealed with the seal of the defendant, and by him delivered to the plaintiff for the consideration therein mentioned, the defendant conveyed to the plaintiff, his heirs and assigns, a certain piece or parcel of land therein described and called Clayfield, &c., a certain other piece or parcel of land therein described as being part of a certain close called Gin Bank, (excepting and reserving unto the defendant, his heirs and assigns, and their servants, agents, tenants, and workmen, certain rights in the said deed specified, but which are not material to the plaintiff's present complaint); and it was by the said deed declared, that it should and might be lawful for the defendant, his heirs and assigns, and his and their tenants, lessees, or grantees, to use and apply for any manufacturing domestic or agricultural purposes, any water flowing from or through the contiguous lands of the said defendant unto and into that portion of the Gin Bank thereafter referred to, returning the surplus, or so much as might remain after being used for the purposes aforesaid, into its natural course or channel at a certain point marked (B) in a map or plan indorsed upon the said deed, and so that the same water should not be at any time diverted from its then present

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track or course, but be allowed to run and flow into that portion of the Gin Bank so marked (B) as aforesaid. And the plaintiff says that divers large quantities of water afterwards, and after the making of the said deed, flowed from and through the said contiguous lands of the said defendant, and would in the natural and ordinary course of the said water have flowed unto and into that portion of the said close called the Gin Bank so marked (B) as aforesaid, and that some of the said water was used and applied by the said defendant, and his tenants, lessees, and grantees, for manufacturing, domestic, and agricultural purposes, but a large surplus remained. Yet the plaintiff says, that such surplus was not returned into its usual course or channel at the said point so marked (B) as aforesaid in the said map or plan, and that a large quantity of the said water which flowed from and through the said contiguous lands of the defendant, and which would in the natural and ordinary course of the said water have flowed unto and into that portion of the said close called the Gin Bank so marked (B) as aforesaid, and which was not used by the defendant or his assigns or his or their tenants, lessees, or grantees, for manufacturing, domestic, or agricultural purposes, has been wrongfully diverted by the defendant from the track or course thereof in the said deed mentioned, to wit, its track or course at the time of the making of the said deed, and that the defendant has wrongfully prevented large quantities of the same water from running and flowing into the said portion of the Gin Bank so marked (B) as aforesaid, and thereby the plaintiff has been prevented working certain mills and manufactories of his which are situate near to the said portion of the said Gin Bank as beneficially as he might and otherwise could and would have done, and he is otherwise greatly injured.

The defendant's pleas were as follows:—First: Not guilty. Secondly to the first count, a denial of the plaintiff's right to the flow of the streams and watercourses therein mentioned.

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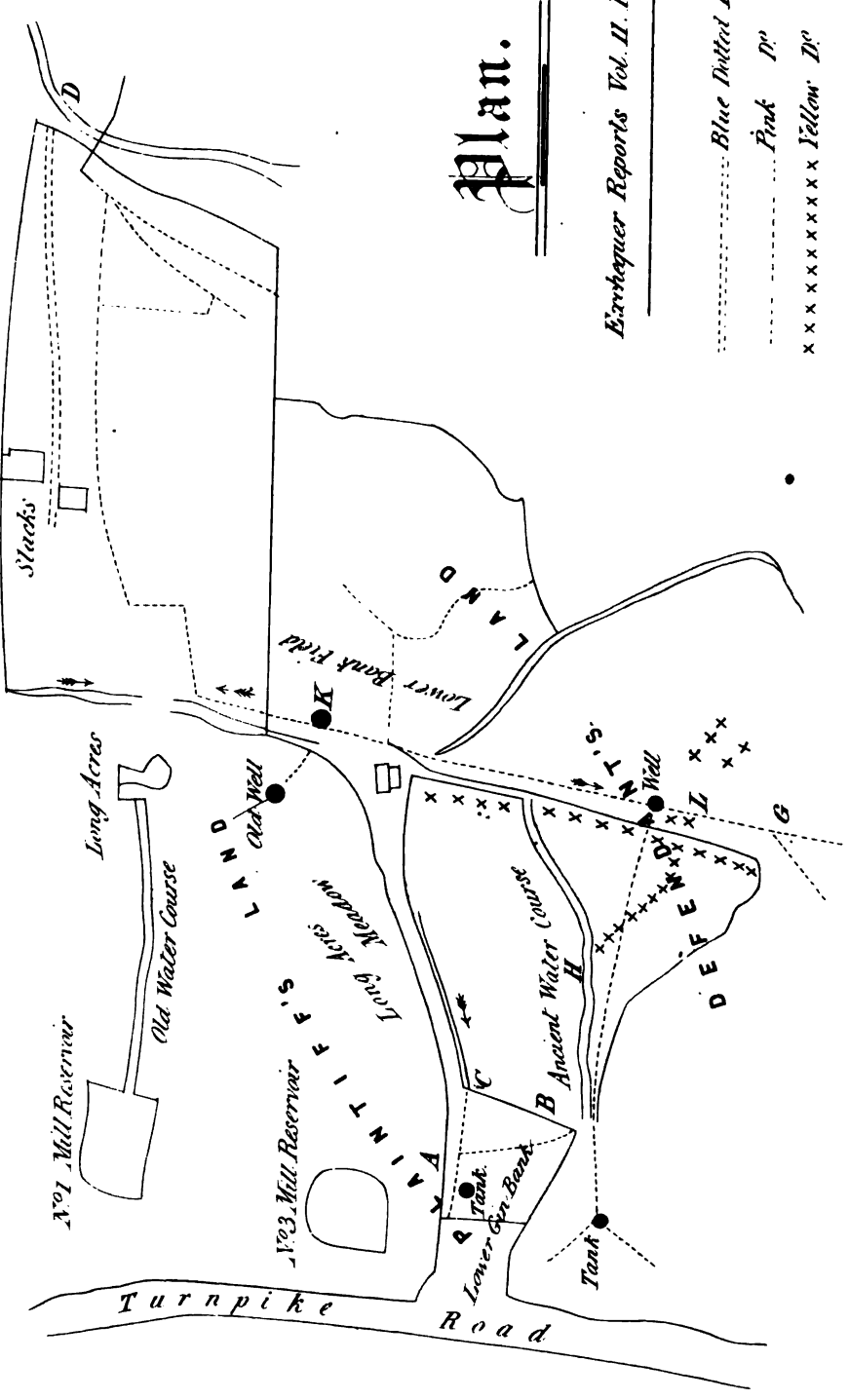
—Thirdly to the second count, a denial of the plaintiff's right to the flow of the streams and watercourses therein mentioned.—Fourthly to the third count, a denial that the plaintiff was entitled to the benefit and advantage of the flow and percolation in that count mentioned, or that the water would have flowed to the mills and manufactories of the plaintiff.—Fifthly to the fourth count, that quantities of water did not, after the making of the said deed, flow through the lands of the defendant, nor would they in the natural and ordinary course have flowed unto or into that portion of the said close called the Gin Bank so marked (B) as in that count alleged.—Sixthly to the fourth count, that a surplus of the water so used and applied did not remain as alleged.—Seventhly to the fourth count, that no water which the plaintiff was entitled to, had been diverted by the defendant or prevented by him from flowing unto and into the said portion of the said Gin Bank marked (B) as in the said count alleged.

Issue in fact was joined upon each of the pleas.

The cause came on for trial at the Liverpool Spring Assizes, 1854, and an order was then made, by consent, that a verdict should be entered for the plaintiff, subject to the opinion of this Court upon a special case in which the facts were to be stated by an arbitrator, and the damages (if any) sustained by the plaintiff in consequence of the diversions complained of, specifying the particular damage (if any) sustained, to be attributed to each diversion respectively.

In pursuance of this order the following special case was stated for the opinion of this Court. Copies of the pleadings, and a plan shewing the plaintiff's lands and the contiguous lands of the defendant, accompanied the case, and were to be taken as part thereof.—

The plaintiff is the owner and occupier of certain mills and reservoirs shewn upon the plan. He is also the owner of all the property edged green. The defendant is the owner of the land upon the plan edged pink. The injury



Plan.

Extraneous Reports Vol. II. Page 373.

- Blue Dotted Line.
- Pink
- Yellow

complained of is the diminution of the water conveyed down the streams to the reservoirs to mills Nos. 1 and 3, caused by certain works of the defendant. The streams must be considered respectively.

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In 1832 the plaintiff erected mill No. 1, and placed the reservoir on an old watercourse shewn upon the plan. It flows down from a place called the Long Acres, and derived some supply of water from the two sources which will be now adverted to. The land slopes principally from the right to the left of the plan. The arrows shew more accurately the direction of the slopes. At the right hand, about the top of the plan, at the spot marked D, upon moor land just outside the defendant's property, was a wet, spongy spot. At most seasons of the year some water rose to the surface, and sufficient collected to flow down the slope of the land. It took the direction down a hollow place inside of the wall along the course of the blue dotted line to the Slacks farm house. In times of wet a great body of water flowed down, and after a long drought there was hardly any, and sometimes none. There was no regular formed ditch or channel for the water, the place where it flowed being constantly trodden in with cattle. There was at times a drinking place for cattle at the corner of the field near D., but unless kept clear it was soon trodden in with cattle. Near to the Slacks there was a channel cut, which conveyed the water into a trough there, which the water flowed through and supplied the house. The water after leaving the trough took no particular direction. It either flowed over the meadow down the slope of the land, or the tenant of Slacks made it flow through the manure heap and then over the meadow; or at times of a great flow of water the tenant turned it to the back of the house, through a hole in the fence, or cut a channel to carry it off, whichever was most convenient: but whichever direction was given to the water, so much of it as was not absorbed by the land (and all was not absorbed except in times of

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drought) found its way down the slope of the land into a ditch which carried it to Long Acres and thence down the old watercourse. The water had flowed in the manner above described for more than twenty years before the act of the defendant complained of, in fact, as far back as living memory could speak to. The defendant, for the purpose of procuring a supply of water to some property belonging to him, situate toward the bottom of the plan, and at the same time draining his land, laid many pipes in his field, as shewn by the pink dotted lines; and one drain was laid up to the point D., off his own land, and this took the water away which would otherwise have flowed down by the Slacks in the manner stated, and diminished the supply of water to the reservoir to mill No. 1. This is one of the acts of diversion complained of; and if the plaintiff is, under the facts stated, entitled to maintain an action in respect of it, the damages are, by consent, assessed at 5*l.* 5*s.*

The other source from which some supply of water was derived was at the point K. in the Lower Barn Field, not far from Long Acres. There had always, as long as any one could recollect, been water rising to the surface there. There had generally been a regular drinking place for cattle formed with stones, and the overflow of the water went down into the ditch near K., on the right of the Long Acres meadow, and flowed to Long Acres and there supplied a trough, and then flowed down the watercourse. There had been a trough in the Long Acres field about the point marked "Old Well," which had been supplied with water by a drain from the ditch. The defendant carried one of his drains under the spot K., where the water had formerly collected on the surface, and by so doing conveyed the water, which had formerly risen to the surface, to the property at the bottom of the plan before referred to, and since that was done there had been no more water rise to the surface there, and the supply which the reservoirs formerly derived from that source has been taken away. If

the plaintiff is entitled to maintain an action in respect of the taking of the water, the damages are, by consent, assessed at 5*l.* 5*s.*

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The interference with the water also complained of by the plaintiff, relates to the supply of water to the reservoir to mill No. 3. For much more than twenty years before the act complained of, an old drain, shewn by the yellow dotted line, had opened at the point H. into an ancient watercourse, coloured yellow. This watercourse, after joining another at the point B., flowed to the point A., and thence contributed to supply the plaintiff's reservoir to mill No. 3, from the time of its erection in the year 1845; and, as this drain at its upper portion passed through some springy ground, there was generally water flowing down it which ran along the watercourse and helped to supply the reservoir. The defendant, a short time before the commencement of the action, caused to be constructed at the point marked L., a tank or well, which he had the means of locking up, and of which he kept the key, and this was so constructed as to enable him to send the water collected in it in the direction down either of the dotted pink lines, or down the old drain (dotted yellow line) leading to the point H., and he caused the old drain to be stopped up near to the well, and the water flowing down it from above to be turned into the well. By this means the greater portion of the water which had formerly flowed down the old drain was conveyed into the well, and, as the defendant before the commencement of the action had caused all the water collected in the well to flow down one or other of the channels dotted pink, the act of the defendant in stopping the drain had undoubtedly caused the supply of water to the plaintiff's reservoir to mill No. 3 to be diminished. The drain shewn by the yellow dotted line was originally constructed by the owner or occupier for the purpose of draining the land, and it does not appear to have been repaired or kept in order by any other person at any time.

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In the year 1845 the defendant sold to the plaintiff the two fields coloured pink, and he had previously to that time constructed in the upper of these fields a tank, shewn on the plan not far from the point A., in which all the water coming down from the point B. was collected and used by him for the supply of some houses belonging to him. The flow of water down the old drain into the watercourse at H. had continued, at the time of the sale to the plaintiff, more than twenty years. By the terms of the deed of conveyance, dated the 11th of August, 1845, the defendant conveyed the two fields described as a close, and a piece of land, together with all ways, waters, watercourses, liberties, privileges, rights, members, and appurtenances to the same close and piece of land belonging or appertaining. And the deed contained a proviso in the following words: "Provided always, and it is hereby declared and agreed, that it shall and may be lawful to and for the said James Taylor, his heirs and assigns, and his or their tenants, lessees, or grantees, to use and apply for any manufacturing, domestic, or agricultural purposes, any water flowing from or through the contiguous lands of the said James Taylor, unto and into that portion of the Gin Bank hereafter referred to, reserving the surplus, or so much as remains after being used for the purposes aforesaid into its usual course or channel at the point marked B. in the said map or plan, and so that the same water be not at any time diverted from its present track or course, but be allowed to run and flow into that portion of the Gin Bank so marked B. as aforesaid. The part of the Gin Bank referred to is called Lower Gin Bank on the plan.

The water diverted by the defendant from the drain shewn by the dotted yellow line into the lock-up-well, and thence conveyed by him along the pink dotted line, was then consumed by the tenants of the defendant's property for domestic purposes, and the defendant was paid for it either in the rent or otherwise. If the Court thinks the action maintainable

under the above facts in respect of the last-mentioned diversion, then the damages are by consent assessed at 5*l.* 5*s.*

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And, as regards the second and third counts of the declaration, the arbitrator found that the drains laid by the defendant have not so far prevented water from percolating or flowing to the watercourses on the lands of the plaintiff as to affect his supply of water, except in the manner above specified.

And, as regards the fourth count of the declaration, which is founded upon the proviso contained in the before-mentioned deed of the 11th August, 1845, the facts are those above stated, viz. the diversion by the defendant into the lock-up-well of the water which had been accustomed to flow along the yellow dotted line, and the causing the water to be conveyed from the well along the pink dotted lines to be there used by his tenants. It does not appear that any water was conveyed away from the well which was not consumed for domestic or agricultural or manufacturing purposes by the defendant or his tenants and grantees. The water conveyed away from the well towards the bottom of the plan could not afterwards be returned to the point B.

A copy of the deed of 11th August, 1845, is annexed. If the action is maintainable in respect of the complaint contained in the fourth count, the damages are by consent assessed at 5*l.* 5*s.*

The questions for the opinion of the Court were, whether the appropriations by the defendant, under the circumstances above stated, of the water at the points D., K., and L., are wrongful, so as to entitle the plaintiff to maintain an action in respect of them, or either of them; and, whether the diversion of the water upon the yellow dotted line into the lock-up-well at L., and the alleged use of the water described, was an infringement of any covenant or agreement contained in the deed of 11th August, 1845, so as to make an action maintainable: and the Court will determine

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how the issues are to be entered, and for what amount of damages, if any, the verdict is to stand (a).

Manisty for the plaintiff—The case raises three distinct questions, and it is submitted that the plaintiff is entitled to maintain this action in respect of the interference by the defendant at the three several places on his land.

First, as to the spot D. The defendant had no right to abstract the water rising at that point in the mode which he has adopted. It may be admitted, that the water which rises out of the soil at that spot is mere surface water, and does not follow any accustomed or defined channel; but it finds its way to the plaintiff's reservoir, and he has lost a portion of it by the defendant's mode of draining his land. [*Parke, B.*—The plaintiff has no right to the rain water which may flow from that spot to his land; and what authority is there for saying that spring water differs in this respect from rain water? In *Greatrex v. Hayward* (b), this Court adopted the dictum in the judgment of the Court in *Wood v. Waud* (c), by deciding that the flow of water from a drain made for agricultural improvements for twenty years, does not give a right to the neighbours, so as to preclude the proprietor from altering the level of his drain for the improvement of his land.] In *Greatrex v. Hayward*, the proprietor of the land effected the alterations which caused the diversion of the water, for the bonâ fide purpose of drainage only, and not for that of profit. [*Martin, B.*—The proprietor of the soil has primâ facie the right to drain his land; and unless there is some express authority to shew that his motive in so doing affects the question, in my opinion the motive is altogether immaterial.]

Secondly, as to the spot K. The water at this place forms a drinking place for cattle, and flows into a ditch. It is a spring of water which flows in a particular direction,

(a) See Plan.

(b) 8 Exch. 291.

(c) 3 Exch. 748.

and along a certain course. The judgment of this Court in *Dickinson v. Grand Junction Canal Company* (a) is in favour of the plaintiff's claim. The Court there say: "We consider it as settled law that the right to have a stream running in its natural course is not by a presumed grant from long acquiescence on the part of the riparian proprietors above and below, but is *ex jure naturæ*: *Shury v. Piggot* (b), *Tyler v. Wilkinson* (c); and an incident of property, as much as the right to have the soil itself in its natural state, unaltered by the acts of a neighbouring proprietor, who cannot dig so as to deprive it of the support of his land." And the Court, after referring to *Acton v. Blundell* (d), where the question as to the right to under-ground water was discussed, proceed to say that "when water is on the surface, the right of the owner of the adjoining land to the usufruct of that water is not a doubtful matter of fact; it is public and notorious, and such a right ought as a matter of course to be respected by every one; and indeed if the course of a subterranean stream were well known, as is the case with many, which sink underground, pursue for a short space a subterraneous course, and then emerge again, it never could be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground." [*Martin, B.*—The difficulty on this point arises from the question as to the precise character of the place. If the water forms a regular watercourse, the plaintiff may be entitled to it; but if it is a mere springy and spongy spot, he would not be entitled as of right to the surplus water.]

Thirdly, the plaintiff is entitled to succeed as to the diversion of the water at the spot L. This question depends either upon the deed, or on the plaintiff's right at common

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(a) 7 Exch. 282.

(b) 3 Bulst. 339.

(c) 4 Mason American Rep. 397.

(d) 12 M. & W. 324.

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law. By the deed of 1845, by which the defendant conveyed to the plaintiff the Gin Bank, the defendant grants "all ways, waters, watercourses, liberties, privileges, rights, members, and appurtenances to the same close and piece of land belonging or appertaining." [Parke, B.—In the ordinary form of the conveyance of such a right, the terms used are "all rights, &c. ordinarily used and enjoyed therewith."] The defendant had no right to divert the water from the course it pursued at the date of the conveyance, and he has done so by confining the water in the tanks. He has not returned the surplus, which he was bound to do. This amounts to a diversion; and though the plaintiff may not have, in fact, lost any water by such diversion, the defendant has derogated from his grant, and is liable in damages for a breach of his covenant: *Northam v. Hurley* (a). The plaintiff is entitled to this water independently of the conveyance: *Magor v. Chadwick* (b). [Parke, B.—In *Wood v. Waud* (c), the Court said, that the general proposition laid down by Lord Denman in *Magor v. Chadwick*, "that, under all circumstances, the right to watercourses, arising from enjoyment, is the same whether they be natural or artificial, cannot possibly be sustained." The plaintiff has not enjoyed the water as an easement, and no grant can be *presumed*. This question, therefore, depends wholly upon the conveyance.]

Cowling (*Hugh Hill* with him) *contra*.—First, as to the water at the spot D. The plaintiff, by his admission that this is mere surface water, in effect abandons the point. This is not a stream with banks, and there are no riparian proprietors. It is a mere watershed, and the proprietor of the adjoining land cannot dispute the owner's right to drain his land, for the purpose of getting rid of the water, or for any other object. [Parke, B.—It must be

(a) 1 E. & B. 665.

(b) 11 A. & E. 571.

(c) 3 Exch. 777.

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shewn that the plaintiff possesses some definite right, in order to deprive the defendant of his general right to cultivate his land in the manner he may think most advantageous to him, with a view to make the most of it.] The plaintiff has gained no right to the water, for, as against him, the tenants of Slacks have constantly used it. [*Parke, B.*—We entertain no doubt on this point. This is not a stream which the plaintiff is entitled *ex jure naturæ* to enjoy without diminution. If the plaintiff's argument were correct, the defendant would not be entitled to drain his land for the purpose of building upon it.]

Secondly, the argument as to the water at the spot K. stands on the same footing. This is not a regular spring. The overflow is not constant. It is stated to have been "generally" a place where cattle had been accustomed to drink. It is mere surface water during part of its course. The case differs essentially from that of *Dickinson v. Grand Junction Canal Company*, where the water flowed in a regular stream. The surface supply is merely casual. The rights of the neighbours with reference to such surplus water is subject to the rights of the owner of the land to cultivate it.

Thirdly, as to the spot L. The plaintiff has no common-law right to this water: *Gale on Easements*, p. 48; and the conveyance does not pass it. The proviso does not pass anything as to which the covenanting part of the deed is silent. [*Parke, B.*—The proviso may be referred to, for the purpose of ascertaining what the parties intended should pass under the terms of the grant itself.] The defendant has not been guilty of a diversion, as he has not used the water except for domestic, agricultural, or manufacturing purposes, and this he was entitled to do according to the terms of the proviso.

PARKE, B.—With respect to the first question, as to the interference of the defendant with the water at the spot D.,

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I am of opinion that the defendant is entitled to have the verdict entered for him. This is the case of common surface water rising out of springy or boggy ground, and flowing in no definite channel, although contributing to the supply of the plaintiff's mill. This water having no defined course, and its supply being merely casual, the defendant is entitled to get rid of it in any way he pleases. The same observations apply to the water rising at the point K. This water has no defined course, and the supply is not constant, therefore the plaintiff is not entitled to it; the case of *Dickinson v. Grand Junction Canal Company* does not apply; and the defendant is entitled to get rid of this also, for the purpose of cultivating his land in any way he pleases. With respect to the last and most important point, which relates to the interference with the flow of the water to Lower Gin Bank, we must look to the deed, for the plaintiff's rights to that water depend solely upon the deed. By that instrument the defendant conveys to the plaintiff the Gin Bank, "together with all ways, waters, watercourses, liberties, privileges, rights, members, and appurtenances to the same close and piece of land belonging or appertaining." Now, this right to this water would not pass independently of the deed, as the plaintiff would have no right to water in alieno solo. Natural watercourses are like ways of necessity. The right to have a stream running in its natural direction does not depend on a supposed grant, but is *jure naturæ*: *Shury v. Pigott*. But if the stream is artificial no such right exists. This is not a natural watercourse; but the plaintiff is entitled to the flow of this water, under the conveyance which gives it to him, by the terms of the grant. It is unnecessary to say whether this right passed under the proviso, which however throws light upon the grant, and shews that this water was intended to be conveyed. The proviso is for the benefit of the defendant, and gives him the right to apply any water flowing through his land for certain specified purposes; but

when he has taken such water, he is bound to return the surplus into its usual channel in the watercourse at a certain place. And I am of opinion that the defendant has no right to make any permanent diversion of the water. He may take away the water in buckets, or by any other mode of conveyance for domestic, agricultural, or manufacturing purposes; but when he has taken what he wants, he is bound to return the surplus into its usual channel at the place mentioned in the plan for the use of the plaintiff, and he cannot divert the water. It seems to me clear, on looking at the proviso, what the defendant grants to the plaintiff by the conveyance; and the defendant is not entitled to more than what is reserved to him by the proviso. He has permanently diverted the water by placing it under lock and key, and by so doing has deprived the plaintiff of the use of it. I am, therefore, of opinion that the verdict ought to be entered for the defendant as to the two first causes of action; and, as to the third, that the verdict entered for the plaintiff should stand.

PLATT, B.—I am of the same opinion. As to the first two points the defendant is clearly entitled to succeed, as this was merely surface water, and the defendant had a right to drain his land, and the plaintiff could not insist upon the defendant maintaining his fields as a mere water-table. With respect to the third point, I am of opinion that the plaintiff is entitled to retain the verdict. The proviso is the key to the deed. It is an exception founded upon that which had been previously granted. By that clause the defendant is entitled to the use of the water for manufacturing, domestic, or agricultural purposes; but this is subject to the condition that he returns the surplus into the channel at a particular point. The right to these waters in alieno solo would not pass except by the deed, and that is clearly conveyed by the deed. The next question is, whether the defendant has diverted the water. The defendant,

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having a limited right only to the use of the water, constructs a tank, and locks up the water, and thereby deprives the plaintiff of its use. That is a breach of his covenant. He might make a reservoir, and cover it over, merely using the water for the purposes specified in the proviso, but he was bound to return the surplus.

MARTIN, B.—I am of the same opinion. As to the two first points I think that the defendant is entitled to succeed. He is at liberty to get rid of the surface water in any manner that may appear most convenient to him; and I think that no one has a right to interfere with him, and that the object he may have in so doing is quite immaterial. As to the third point, I think the plaintiff is entitled to retain the verdict. At the time the conveyance was executed there were certain watercourses and drains upon the defendant's land, and by the conveyance the defendant granted to the plaintiff a piece of land, and a right to the waters and watercourses to that piece of land belonging or appertaining. The defendant grants all the waters, and cannot derogate from his own grant by cutting off the supply. In my opinion the grant is of a flow of water which increased the stream in question. And *Northam v. Hurley* (a) shews, that the correct rule of law is, that where a party is entitled to a grant of water under a deed, the grantor is liable in damages if he derogate from his grant by diverting the water, although the grantee be not deprived of the use of any of the water by such diversion. When the defendant locked up the water, and prevented it from flowing into the channel at the place in question, he did divert it, and was guilty of a breach of his covenant as stated in the fourth count of the declaration (b).

Verdict accordingly (c).

(a) 1 E. & B. 665.

(b) *Alderson*, B., was present during part of the argument, but had left the Court before its con-

clusion.

(c) See *Broadbent v. Ramsbottom*, post.

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LORD FEVERSHAM *v.* EMERSON.

June 18.

TRESPASS for breaking and entering certain land of the plaintiff called Cranmoor, in the manor of Bilsdale, in the parish of Helmsley, and there digging and raising jet, ores, &c., and converting them to the defendant's use.

The defendant pleaded *liberum tenementum*, not guilty, and other pleas, on which issues were joined.

At the trial, before *Parke, B.*, at the last York Spring Assizes, it appeared that the plaintiff was lord of the manor of Bilsdale, in the parish of Helmsley, and that the defendant was lord of the adjoining manor of Kirkby, in the parish of Kirkby, and that the action was brought to recover damages for certain jet dug by order of the defendant in land which the plaintiff claimed as his. On the part of the plaintiff evidence by acts of ownership was adduced to shew the boundaries of the manor of Bilsdale, and an award was given in evidence made in the year 1812, at the time when the plaintiff's father, Mr. Duncombe, was lord of the manor of Bilsdale. The award was made under the following circumstances:—In 1811, one Cass, a freeholder of the manor of Kirkby, having claimed a right to get stone in the locus in quo, and a tenant of Mr. Duncombe having broken a stone trough in that place, Cass brought an action of trespass against Mr. Duncombe. The action was referred to arbitration, and the then lord of Kirkby, the plaintiff and the defendant in the action, were parties to the submission. The award, which was duly made, after reciting the claim of Cass to get stone, the declaration in the action, and plea of not guilty, and that inasmuch as the question of boundary between the said manors of Bilsdale and Kirkby might appear to be involved in the said action, it had been mutually agreed be-

A replication by way of estoppel may be replied to a plea of *liberum tenementum* and if the plaintiff does not avail himself of that liberty, but merely joins issue on the plea, the matter, which might have been so replied, is not conclusive evidence in his favour, but is merely evidence to go to the jury.

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tween Mr. Duncombe, and Cass, and the other party (under whom the present defendant claimed), that the line of boundary of the two manors should also be referred to the arbitrator, who should have full power to ascertain the boundary between the said manors, and to fix the same by such boundary marks as he might think necessary, proceeded to state that the arbitrator did set out and determine the boundary line between the two manors of Bilsdale and Kirkby, including within the former the disputed spot in the action; but the arbitrator also awarded that Cass had a right to get stone within certain boundaries, and also that the lord of the manor of Kirkby had a right to get stone for all purposes within certain limits, including the locus in quo, and to sell the same without compensation to the lord of Bilsdale. The plaintiff relied upon this award as conclusive evidence against the defendant in answer to the plea of *liberum tenementum*.

On the part of the defendant it was contended, that either the award was void, or, if it was valid, that in effect it gave the soil of the locus in quo to the defendant, although locally situated in the manor of Bilsdale; and, lastly, that if it supported the plaintiff's title, it was not conclusive against the defendant, as it might have been replied by way of estoppel, and should have been so replied. The learned Judge was of opinion that the award was good, but that it was not conclusive, as it had not been replied by way of estoppel, although as evidence in the plaintiff's favour it was entitled to great weight. The defendant having given evidence of his title to the locus in quo, the case was left to the jury, who found a verdict for the defendant.

Cowling obtained a rule nisi for a new trial, on the ground of misdirection.

Knowles, J. Addison, and Alderson shewed cause (June 14).—Assuming that the award does operate as an estoppel

between these parties, the question is, whether it could have been replied by way of estoppel to the plea of liberum tenementum. If it could, the plaintiff should have adopted that form of replication, as otherwise the matter is left at large, and the award is not conclusive evidence. It could have been so replied. 10 Viner's Abr. title "Estoppel," (L. 2), pl. 27, contains the following passage: "In trespass the defendant said that it is his frank tenement; the plaintiff said S. recovered it by formedon against the defendant, and had execution before the trespass, and leased to him at will: judgment, if the defendant shall say it is his frank tenement, and a good estoppel *prima facie*: *Per Cur. Moyle* asked, if a tenant at will may plead this estoppel here? To which none answered; and therefore it seems that he well may, and is a good estoppel as well against the master, against whom it was recovered, as against the servant who justified by the same master, and the tenant at will now plaintiff confessed the reversion in S. who recovered, and therefore well: Br. Estoppel, pl. 158, cites 2 E. 4, 21." And 10 Viner Abr. "Estoppel," (Q.) 14, has the following authority for such a replication. "Trespass of a close broken and grass cut. The defendant pleaded his frank tenement. The plaintiff said, that, to say it is his frank tenement, he shall not be received, for his father, whose heir &c., enfeoffed us by his deed, which here is with warranty: judgment if against the deed of his ancestor, which comprehends warranty, shall he be received to say that it is his frank tenement, and the defendant shewed title how he entered after &c., and so admitted for a good estoppel. Br. Estoppel, pl. 89, cites 22 Hen. 6, 50 & 51." The plea of liberum tenementum in direct terms challenges the plaintiff's title to the disputed place, and the award, if an estoppel and pleaded as such, is a good answer to the plea; but the plaintiff, by omitting to avail himself of his right to treat that instrument as an estoppel, loses the benefit of it.—They also contended that

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the award was void, and that it did not in effect amount to an estoppel.

Knowles, Cowling, and Farrer in support of the rule.—The award could not have been replied by way of estoppel. There is no precedent for such a form of pleading applicable to a case like this. In *Outram v. Morewood* (a), it was held, that if a verdict be found on any fact or title distinctly put in issue in an action of trespass, such verdict may be pleaded by way of estoppel in another action between the same parties, or their privies, in respect of the same fact or title. But here there has been a change of circumstances since the award was made; and a matter which requires additional facts to be alleged in order to shew how such matter is to operate cannot be pleaded by way of estoppel. The defendant may have acquired a title since the award was made, and the facts stated in the replication, shewing how the title came to the plaintiff, would in effect amount to a denial of the averments in the plea. [*Parke, B.*—If that argument is correct, an estoppel of a matter which occurred some time ago could never be pleaded; and *Doe v. Wright* (b) was wrongly decided.] There the whole time was covered by the matter replied by way of estoppel. [*Alderson, B.*—In *Vooght v. Winch* (c), it was held that a verdict obtained by the defendant in a former action, and which, if pleaded in bar, would be an estoppel, when given in evidence under the general issue, is not conclusive against the plaintiff, but only evidence to go to the jury.] That decision proceeded upon the assumption that the matter might be pleaded: 2 Smith's L. C. 445. The passage in 10 Vin. Abr. Estoppel (L. 2), 27, is incorrect, and cannot be considered as law, for there the plaintiff was not a privy to the judgment recovered against the defendant; and on referring to the Year Book, 2 Edw. 4,

(a) 3 East, 346.

(b) 10 A. & E. 763.

(c) 2 B. & Ald. 662.

fol. 17 [B.], 10, where the case relied upon is more fully reported, reference is made to 20 Hen. 6, c. 47; but the latter case has no bearing upon the subject. The passage is therefore no authority for the defendant. The award could not be pleaded by way of estoppel to the plea of the general issue, and the plea of liberum tenementum stands on the same footing; for on that plea the plaintiff cannot predict what the title may be upon which the defendant will rely. The award, therefore, could not have been replied, but was conclusive *evidence* of the plaintiff's title to the disputed place. The authorities upon the question of estoppel are collected in the notes to the *Duchess of Kingston's case* (a). [Parke, B.—We will take time to consult the Year Books. At present we are of opinion that the award if relied on as an estoppel should have been replied.] —They also referred to *Reg. v. Houghton* (b), *Trevivan v. Lawrence* (c), *Reg. v. Blakemore* (d).

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PARKE, B., now said—In this case we have postponed our judgment for a short time, in order that we might look at a case in the Year Book 22 Hen. 6, fol. 50, [B.], 14, and see whether it militated in any way against the Year Book 2 Edw. 4, fol. 17, [B.], 10. The case in 2 Edw. 4, clearly shews, that, to a plea of liberum tenementum, the plaintiff may reply, by way of estoppel, that before the time in which the seisin is alleged—that is, at the time of the trespass—there had been a recovery of the land by proceeding in formedon:—that the Court held to be a good *primâ facie* replication, which must be answered by rejoinder. The case in 2 Edw. 4 says, that it was “so adjudged in the time of the late King;” and in the margin of the report, reference is made to the 20 Hen. 6, fol. 47.

(a) 2 Smith L. C. 445.

(c) 2 Ld. Raym. 1048.

(b) 1 E. & B. 501.

(d) 2 Den. C. C. 410.

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I cannot find that the 20 Hen. 6, fol. 47, has any bearing upon the point; but the case in the 22 Hen. 6, fol. 50, 51, [B.], 14, has a direct bearing, and I have no doubt that is the case which was meant to be referred to, as having been decided in the time of the late King. That case proves, that, to a plea of *liberum tenementum*, the plaintiff may reply an *estoppel*. It was an action of trespass, to which the defendant pleaded *liberum tenementum*, and the plaintiff replied by way of *estoppel* that the defendant's father enfeoffed the plaintiff with warranty, and that the defendant was his heir, and therefore bound by it: then there was a rejoinder that the defendant's father, being seised in fee, enfeoffed one Radulph, who enfeoffed the defendant and his father, and the heirs of the body of the defendant; that afterwards the father enfeoffed the plaintiff:—therefore the rejoinder shewed that before the father enfeoffed the plaintiff with warranty, he had already enfeoffed another person, and that that person had enfeoffed the father and the son, so as to make them tenants in common. Then it was argued that the rejoinder was double. After argument the defendant amended; then there was an objection that the rejoinder was a departure from the plea, namely, that it shewed a tenancy in common, and not a sole seisin in the defendant. Such is the case, and it admits that there may be a replication by way of *estoppel* to a plea of *liberum tenementum*. That is the case referred to in Brook's Abridgment, tit. *Estoppel*, pl. 89, which states the same thing. Therefore there can be no doubt that an *estoppel* may be replied to a plea of *liberum tenementum*; indeed the case in 2 Edw. 4, is precisely in point. Then the rule is established by a series of cases, that, if a party means to insist on an *estoppel*, he must plead it. If a party intends to rely on a subject-matter of defence which the law does not favour, he must at his own peril take the earliest opportunity of setting it up. In this case the plaintiff might have replied the award of the arbitrator in 1812, stating

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that the defendant claimed under the parties to the arbitration. It is perfectly well-settled law,—and does not now admit of the least question, because there are no less than seven or eight cases upon the subject,—that, if a party does not take the first opportunity which the pleadings afford him of relying on an estoppel, he leaves the matter at large, and it is competent for the jury to determine upon the evidence, without regard to strict law: *Trevivan v. Lawrance* (a), *Magrath v. Hardy* (b), *Armstrong v. Norton* (c), *Speake v. Richards* (d), *Regina v. Blackmore* (e), *Regina v. Haighton* (f). Then I apprehend that the plaintiff had this opportunity, for he was in full possession of the award, and the freehold boundaries of the manor are stated to have been referred to the arbitrator. It is quite clear, looking to the subject-matter in dispute, that the true point left to the decision of the arbitrator was the right in the waste of the manor. That matter remained at large for the jury to decide; and my Brothers who heard the argument entirely concur, upon the facts of the case, that the jury were perfectly right in coming to the conclusion that the boundary of the waste was that which was alleged by the defendant, and not by the plaintiff. There cannot be the least doubt that the matter should be decided in favour of the defendant, consequently the rule will be discharged.

Rule discharged.

(a) 2 Ld Raym. 1048; 1 Salk.
 276.

(b) 4 Bing. N. C. 782.

(c) 4 Irish Cases, 100.

(d) Hob. 206

(e) 2 Den. C. C. 410.

(f) 1 E. & B. 501.

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MEMORANDA.

IN last Michaelmas Vacation, *Henry Ridgard Bagshawe*, of the Middle Temple, Esquire, was appointed one of Her Majesty's counsel, and in the following Term took his seat within the bar accordingly.

In last Hilary Vacation, *Humphry William Woolrych* of the Inner Temple, Esquire, was called to the degree of the coif, and gave rings with the motto *Leges juraque*.

In the present Vacation, Mr. Justice *Maule* resigned the office of Judge of the Court of Common Pleas. He was afterwards sworn in a member of her Majesty's Privy Council.

He was succeeded by *James Shaw Willes* of the Inner Temple, Esquire, Barrister at Law, who had previously been called to the degree of the coif, when he gave rings with the motto *Non sine vigiliis*. He afterwards received the honour of Knighthood.

The following gentlemen were, in the same vacation, appointed her Majesty's counsel:—*Charles Shapland Whitmore*, of the Inner Temple, Esquire; *William Overend*, of Lincoln's Inn, Esquire; *Percival Andree Pickering*, of the Inner Temple, Esquire; *James Plaisted Wilde*, of the Inner Temple, Esquire; *William Bovill*, of the Middle Temple Esquire.

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IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer.)

GILES and Others v. JONES and Another.

June 30.

THIS was a proceeding in error by the defendant, on the judgment of the Court of Exchequer for the plaintiffs non obstante veredicto, in the case of *Jones v. Giles* (a).

Keating argued for the plaintiff in error in last Hilary Vacation (b), (February 10); and *Gray* argued for the defendant in error. The arguments were in substance the same as those in the Court below.

Cur. adv. vult.

The judgment of the Court was now delivered by

MAULE, J.—In this action the plaintiffs below (the defendants in error) complained of a breach of contract by the defendants below, in not delivering a large quantity, to wit, 240,000 lbs. weight of iron sold by the defendants below to the plaintiffs; the defendants pleaded that the contract for the sale and purchase of the iron was made between the plaintiffs and the defendants after the passing of the 5 & 6 Will. 4, c. 63, and was for the sale and purchase of iron, to wit, 100 tons of iron, long weight, that is to say, at a certain illegal weight, to wit, by the ton weight, consisting of 2400 lb. avoirdupois, being more than twenty hundred weight of the standard weight in the said Act mentioned, contrary to the form of the statute.

A contract for the sale of a certain number of tons of iron, "long weight," is not in contravention of the statutes 5 & 6 Will. 4, c. 63, and 5 Geo. 4, c. 74, and consequently such contract is valid. So held in the Exchequer Chamber (affirming the judgment of the Court of Exchequer).

Semble, that the 15th section of the 5 Geo. 4, c. 74, is not repealed by the 5 & 6 Will. 4, c. 63; and consequently that contracts by local weight may be lawfully made, if the proportion to the standard is expressed; though it is otherwise with respect to measures, all local measures being abolished by the 6th section of the 5 & 6 Will. 4, c. 63.

(a) See the case 10 Exch. 119.

(b) Before *Maule*, J., *Wight-*

man, J., *Cresswell*, J., *Williams*, J., *Crompton*, J., and *Crowder*, J.

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Issue being joined on this plea, a verdict was given for the defendants; but the Court of Exchequer gave judgment for the plaintiffs notwithstanding that verdict; and the question raised by this proceeding in error is, whether the contract appearing on this record was one which could be legally enforced. With regard to the sense in which the plea is to be understood, there seems no doubt that it must be taken to mean, not that the contract was expressed to be by the ton, long weight, of 2400 lbs.; but, that the contract was expressed to be by the ton, long weight, with an averment in the plea of the fact, that a ton, long weight, is a ton of 2400 lbs. avoirdupois. Whether the plea, so understood, shews a defence to the action, was the question discussed on the argument in this Court, and that will depend on the effect of the two Acts relating to weights and measures, 5 Geo. 4, c. 74, and 5 & 6 Will. 4, c. 63, in force at the time of the contract. At the time the former of these Acts passed there were two kinds of pound weight, the pound troy, and the pound avoirdupois, very generally in use; and the exact quantity of these had been ascertained, and a standard brass weight of one pound troy had been deposited in the custody of the Clerk of the House of Commons. The pound avoirdupois was known and fixed as bearing to the pound troy the proportion of 7000 to 5760, or 175 to 144. There were at that time in use names given to certain multiples of the pound avoirdupois, such as stone, hundred-weight, ton, which were generally known and used throughout the country, and also some words used and understood in certain districts where the avoirdupois weight was in use, signifying certain multiples of such pound. There were also local and customary weights not founded on the avoirdupois weight, but upon some local pound or other weight differing from the avoirdupois.

With respect to lineal measure, the yard was in very general use, and its parts and multiples were generally expressed by words of a known meaning, such as feet, inches,

poles, furlongs, and miles. There was an accurate brass standard of the yard in the same custody as the standard troy pound. The state of things with respect to measures of capacity was different. These measures differed for different kinds of goods, as well as in the different places, the legal gallon for dry goods differing from that for liquids, and those for different kinds of liquids differing from one another. There was no gallon or other measure generally known and used for all goods, or for all but some few, as in the case of avoirdupois weight, which was applicable to all goods except precious metals, &c. In this state of things the Act 5 Geo. 4, c. 74, was passed, which repeals the former Acts establishing weights and measures, and substitutes the new regulations, which, modified in some respects by the Act 5 & 6 Will. 4, c. 63, now constitute the law on the subject.

That Act of Geo. 4 recites the necessity that weights and measures should be just and uniform, and that different weights and measures are still in use in various places, and the true measures of the present standards are not verily known, which is the cause of great confusion and manifest frauds, and provides certain enactments for "remedy and prevention of these evils, and to the end that certain standards of weights and measures should be established throughout the United Kingdom." And, in the first place, it provides for the establishment of a standard yard, a pound troy, and a pound avoirdupois, and a gallon, for the general use throughout the kingdom; and, in so doing, it adopts the yard and pounds in general use, and the brass standard before mentioned. With respect to the gallon, it does not adopt any gallon in use, but substitutes a new one, differing from all gallons in use, and directs a new brass standard gallon to be made and deposited in the Exchequer; and it provides and declares that this gallon shall be the unit and only standard measure of capacity from which all other measures of capacity shall be derived. There

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is a provision in this Act as to heaped measure of certain goods, which was afterwards abolished, and need not be further noticed. As the Act made no alteration in the existing pound weight, not only the word pound, but all words by which any number of pounds avoirdupois were expressed, might subsist unchanged, with the sense belonging to them before the Act, consistently with the establishment of the standard pound. Accordingly the Act is silent with respect to any greater weight than one pound, the effect of its provisions being that all weights shall be derived from the standard pounds, leaving unchanged the forms of speech in which weights according to the standard had been expressed. With regard to measures of capacity, the case is different. The standard gallon from which all new measures of capacity are to be derived being entirely new, not only none of the old gallons would be according to the new standard, but all words expressing parts or multiples of the old gallon would be no longer according to the standard, i. e., the new gallon established by the Act. For this reason the Act prescribes expressly that certain words expressing parts and multiples of the old gallon, i. e., the pint, the quart, the peck, the bushel, and the quarter, shall express like parts and multiples of the new; it was necessary to do this unless it were intended to allow the words pint, &c., pecks, &c., to retain their old sense, or at least it was convenient to do it in order to make it clear that it was not intended to allow them to do so. These standards of weight and capacity being established by sects. 4 and 6, the Act in sect. 9 provides for the mode in which contracts, &c., shall be made and had with respect to these weights and measures, by enacting "that all contracts, bargains, sales, or dealings made or had for any other goods," &c. (i. e. other than those sold by heaped measure), "or to be sold, delivered, done, or agreed for by weight or measure, shall be made and had according to the said standard of weight, or to the

said gallon, or the parts, multiples, or proportions thereof." As this is the principal enactment in force respecting the forms of contracts, &c., it may be proper in the first place to consider what effect this section has on the contract in question, and afterwards to inquire how this is affected by any other enactments, premising, that as this section requires *all* contracts, &c., to be made according to the standard pound or gallon, any person making a contract is bound to make it according to the standard; if he make it otherwise he disobeys the enactment, and, as the object of the section is to effect a purpose of general benefit and importance, a contract made in breach of such an obligation is void. Whether the present contract is within the section depends upon its being, or not, a "contract according to the standard weight or some multiple thereof." This will very much depend on the sense of the term *multiple*. This term may be understood in a restricted sense, so as to comprehend only multiples numerically expressed, such as 10 lbs., 100 lbs., &c., or generally all multiples, however expressed, such as a stone, or hundred-weight, or ton, or any other weight, such as a weigh, a tod, or a hobbet, supposing these words to be in use for expressing multiples of the pound avoirdupois. No one has contended that a multiple, to be within this section, must be numerically expressed. There is nothing in the Act so to restrict it: it would be inconvenient in dealing with large weights, such as often occur in traffic; to express 10,000 tons by 2,400,000 lbs., would fail to convey readily a notion of the weight intended, and would impose the trouble of an unnecessary calculation. The now repealed Act, 4 & 5 Will. 4, c. 49, s. 12, clearly assumes that contracts by the ton, hundred-weight, &c., expressed by those words, are contracts lawful under section 9 of 5 Geo. 4. It seems clear, therefore, that a contract need not express numerically the multiple of the pound, in order to be valid under section 9. It may, however, be suggested, that though a multiple may be lawfully expressed within

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this section by words, such as hundred-weight, or ton, of general use and acceptation throughout the country, it does not legalise the use of words only locally in use, though meaning certain multiples of the pound avoirdupois; but there is nothing in the recital of the Act shewing such intention, or in the enactments of it depriving any words expressing multiples of a pound avoirdupois of the sense that belonged to them before the Act, or restricting the use of any words expressing, either generally or locally, multiples of a pound. It requires that contracts should be according to the standard pound, or some multiple &c., of it. All contracts which were contracts by a multiple of the standard pound before the Act, remain so notwithstanding this section.

That agreements in terms expressing multiples of pounds by local customary words are lawful within this Act, is further shewn by the enactment of the 4 & 5 Will. 4, c. 49, s. 12, which recites, that the stone by local custom varies, being in the country generally deemed to be 14 lbs. avoirdupois, and in London eight such pounds, or otherwise, as may be, and provides that in future the stone shall be fourteen such pounds, clearly shewing, that before that Act, i. e., under the Act of 5 Geo. 4, it was lawful to contract with respect to stones of 8 lb., 14 lbs., or any other number of pounds, though such words might be of local meaning. It is here proper to advert to sects. 15 and 16 of 5 Geo. 4, the former of which provides that all contracts, bargains, sales, and dealings within the United Kingdom, for any work to be done, or for any goods, &c. to be sold, delivered, done, or agreed for, by weight or measure, where no special agreement shall be made to the contrary, shall be deemed, taken, and construed to be made and had according to the standard weights and measures ascertained by the Act; and, in all cases where any special agreement shall be made with reference to any weight or measure established by local custom, the ratio or proportion which every such local

weight or measure shall bear to any of the said standard weights or measures shall be expressed, declared, and specified in such agreement, otherwise such agreement shall be null and void. The 16th section follows, and allows persons to use weights and measures which they may have in their possession, although such weights and measures may not be in conformity with the standard weights and measures, and to buy and sell by such weights and measures, provided that their proportion to the standard be marked or painted upon them. The first part of sect. 15, which relates to the construction of contracts, does no more than declare the law, which would itself put the construction prescribed on instruments capable of being so construed; thus, a sale by the bushel was construed to mean a sale by the legal or Winchester bushel: *Hoskin v. Cooke* (a), *St. Cross v. Lord Howard de Walden* (b). This part of the section was introduced as a foundation for the second part, which allows of contracts, &c., not according to the standard weights or measures, when they are made with a special agreement with reference to a weight or measure established by local custom, provided the ratio of the local to the standard weight or measure is expressed in the agreement, otherwise it shall be null and void; this latter part of the section applies to cases where the weight or measure in the contract, &c. is not according to the standard, i. e., when it is not derived from the pound avoirdupois or the imperial gallon, as when the pound or gallon is different from the avoirdupois or from the standard gallon; but, when the pound is the avoirdupois pound, the contract, &c. is according to the standard weight within sect. 9. Whatever word may be used to express any multiple of a weight, with regard to measures of capacity, the standard gallon not existing before the Act, there could not at that time be any system of measures derived from that gallon; and any con-

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(a) 4 T. R. 314.

(b) 6 T. R. 338.

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tract, &c. made by any measure whatever existing before the Act, whether it was derived from a gallon existing before the Act, or otherwise, would be a breach of the duty imposed by the 9th section, and, therefore, void under that section, but might be made valid under sect. 15, by expressing the proportion of the local measure to the imperial gallon.

These considerations are sufficient to shew that the plea in question does not shew any illegality under the 5 Geo. 4. It states the contract to have been for sale by the ton long weight, that is to say, a certain illegal weight, consisting of 2400lbs. avoirdupois, being more than 20 cwt. of the standard weight mentioned in the Act 5 & 6 Will. 4, c. 63. This description of the contract either shews it to be a contract by a multiple of the pound avoirdupois, or, at least, does not shew that it was not by such multiple, as was done in the plea in *Hughes v. Humphreys* (a). Indeed, the present plea is framed, not with a view to the 5 Geo. 4, but the other Act which I am about to consider.

Assuming, then, that the present contract, as stated in the plea, is not invalid by reason of anything in the 5 Geo. 4, it remains to be considered whether it is affected by the 5 & 6 Will. 4, c. 63. Before that Act, an Act of 4 & 5 Will. 4, c. 49, was passed, which was repealed by the 5 & 6 Will. 4, c. 63, by which some of its provisions were re-enacted without variation, and some with important variations.

The first provision in the Act of 4 & 5 Will. 4, which requires notice, is one at the end of the 1st section (which is re-enacted in the same words by the Act of 5 & 6 Will. 4), repealing so much of the Act 5 Geo. 4, c. 74, as allows "the use of weights and measures" not in conformity with the standard, or allows "goods or merchandise to be bought or sold by any weights or measures established by local custom, or founded on special agreement."

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It has been thought that this repeal applies to sect. 15 of 5 Geo. 4, as well as to sect. 16. But if carefully examined, it will appear that the repeal is confined to sect. 16, which recites the expediency of allowing persons *to use* the weights &c. not according to the standard which they may have in their possession, and enabled them to *buy and sell by weights and measures* other than the standard established by local custom, or founded on special agreement, marking the proportion to the standard on the weights &c., and not to sect. 15, which relates to the manner in which contracts &c., whether for sale or for work to be done, or otherwise, may be expressed, and has no reference to any use to be made of any substances to be used as weights. It seems, therefore, that sect. 15 of 5 Geo. 4, c. 74, is unaffected by this repeal, and that contracts by local weights may be lawfully made if the proportion to the standard is expressed, though it may be otherwise with respect to measures, all local measures being abolished by sect. 6 of 5 & 6 Will. 4.

The 12th section of the Act 4 & 5 Will. 4, already referred to as throwing light on the construction of the word *multiple* in the 5 Geo. 4, requires particular attention with regard to the immediate question in the present case. That section recites, that, by local custom in the markets &c., throughout the United Kingdom, the denomination of the stone weight varies, being in the country generally deemed to contain 14lbs. avoirdupois, and in London commonly eight of such pounds, or otherwise as may be; and enacts, that the weight denominated the stone shall in all cases consist of fourteen standard pounds avoirdupois, and that the weight denominated an hundred-weight shall consist of eight of such stones, and that the weight denominated a ton shall consist of twenty such hundred-weights; and all contracts made by any other stone, hundred-weight, or ton shall be null and void. It appears, from the recital of this section, that it was mainly directed to the variations in the

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stone weight, which, when it expressed any multiple of a pound avoirdupois, was untouched by the provisions of 5 Geo. 4, c. 74. It does not recite any variations in the denomination of ton and hundred-weight, and the mention of them was made, probably, because it might have been considered, if they had not been mentioned, that in places where the stone was 8lbs., and the hundred-weight 112lbs., and the ton 20 cwt., that, as before the Act the hundred-weight was 14 stone of 8lbs., and the ton 20 such hundred-weights, the hundred-weight and ton not being mentioned, the hundred-weight after the Act must be considered as 14 stone of 14lbs., or 196lbs., and a ton 20 such hundred weights.

The provision with which this section concludes, making void all contracts, &c., by any other stone, hundred-weight, or ton, would, if it were still in force, apply to the present case. It, indeed, is of a highly prohibitory nature, and would unreasonably restrain contracts made according to the standard weight, such as a contract expressed to be by the stone of 8 lbs., or the hundred-weight of 112 lbs. Such contracts were restrained by this section, though contracts expressed to be by the pound of 18 oz. would be valid by 5 Geo. 4, c. 74, s. 15. It was probably for this reason that this part of the section was repealed before it had been a year in operation. The Act of 5 & 6 Will. 4, c. 63, repeals by sect. 1 the whole of the Act of 4 & 5 Will. 4, and, though it re-enacts a part of sect. 12, it omits the clause making void contracts by any other stone, &c. The section in 5 & 6 Will. 4, c. 63, which is substituted for the 12th section of the 4 & 5 Will. 4, is the 11th, which recites that the denomination of the stone weight varies by local custom, and proceeds to enact, as in the former Act, that the stone shall be 14 lbs., the hundred-weight 8 stones, and the ton 20 cwt. It then proceeds to enact, that nothing herein contained shall prevent any bargain, sale, or contract, being made by any multiple, &c., of the pound weight. It is

clear that the restrictive clause at the end of sect. 12 of 4 & 5 Will. 4 was purposely omitted in sect. 11 of the present Act, inasmuch as that section not only omits the restriction but substitutes for it an enabling proviso, giving validity to contracts even if not in accordance with the preceding part of the section, provided they are made by any multiple, &c., of a pound weight. The effect of the whole sect. 11 taken together seems to be, that the words stone, hundred-weight, ton, shall no longer be ambiguous in themselves, or dependent for their meaning on local custom, but when used simply shall have the meaning given by the Act; but that a contract expressed to be by a certain number of pounds shall be valid, notwithstanding it may conflict with the regulation as to the meaning of the words stone, hundred-weight, and ton, contained in the first part of the section. This section, indeed, does not in terms *prohibit* any kind of contract; it imposes on certain words a certain sense; they must be understood in such sense if the contract itself do not shew that they are used in a different sense; if it do shew that a different sense is intended, perhaps it might be impliedly void under the first part of the section; but if in the different sense a multiple of a pound avoirdupois is expressed, it is rendered valid by the proviso at the end of the section, by being exempted from the effect of the first part of the section, and left to the validity which it had under 5 Geo. 4, c. 74, s. 9.

The plea, therefore, as it does not shew that the contract was not for a multiple of a pound, shews no defence under sect. 11 of 5 & 6 Will. 4, c. 63. Sect. 21 of 5 & 6 Will. 4 has been suggested as affecting this case; but on a careful examination it appears that that section applies only to the actual weights and measures, which it requires to be according to the standard to be properly stamped, and not to be light or otherwise unjust, and that the provision (that every person who shall use any weight or measure other than those authorised by this Act, or some aliquot part

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thereof as hereinbefore described, or which has not been so stamped as aforesaid, or which shall be found light or otherwise unjust, shall forfeit a sum not exceeding 5*l*.; and any contract or sale made by any such weights shall be wholly null and void, and every such light or unjust weight and measure shall be forfeited) applies to cases of the use of, or contract for sale &c. by, certain actual and particular weights, unstamped, light, or different from the standard, and not to contracts not having reference to such actual weights or measures. That a sale by a *denomination* of measure different from the imperial is not comprehended in the prohibition in sect. 21, if using any measure other than those established by the Act, would also appear from the consideration that sect. 6 prohibits a sale by a denomination of measure not imperial, under a penalty of 40*s*.; whereas, the *use* of a prohibited measure is, by sect. 21, subjected to a penalty of 5*l*.

Thus, having examined all the enactments which have been suggested as affecting the contract in question, it appears that there is nothing in them to deprive it of that legality which it certainly has at common law. It follows that the judgment of the Court of Exchequer should be affirmed.

Judgment affirmed.

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CUTHBERT v. CUMMING.

June 14.

THIS was an appeal by the plaintiff, under the 34th section of "The Common Law Procedure Act, 1854." The pleadings and facts are fully stated in the report of the case in the Court below (a).

Bramwell (*Burnie* with him) for the appellant.—First, the custom has no application to a charter-party of this description, by which the charterer has the option of loading in one or other of three ways, viz. either a full and complete cargo of sugar and molasses and other produce, or a full and complete cargo of sugar and molasses, or a full and complete cargo of other produce. A custom, which relates solely to the loading of sugar and molasses, cannot control a contract by which other produce may be loaded. [*Crompton*, J.—Would it not be a good plea, that the defendant had loaded a full and complete cargo of sugar and molasses?] That might mean either an absolute full and complete cargo, or a customary full and complete cargo; but as the custom is inapplicable, the plea would not be supported by the facts. [*Cresswell*, J.—The defendant has loaded a full and complete cargo of sugar and molasses, and also other produce; and it does not render the cargo of sugar and molasses the less a complete cargo because he has loaded something more.] If the obligation had been to load sugar and molasses *alone*, the plaintiff would have been bound to take that cargo, and could not have complained that the defendant had only loaded the customary

By charter-party the defendant agreed to load on board a vessel at Trinidad "a full and complete cargo of sugar, molasses, and other produce." It appeared that it was the custom at Trinidad, to load sugar in hogsheads, and molasses in puncheons, in which mode they were carried more conveniently and with less loss to the merchant, and that a full and complete cargo of sugar and molasses meant a cargo so packed:—*Held*, on appeal in the Exchequer Chamber (affirming the judgment of the Court below) that the custom was admissible in evidence; for it was applicable to such a charter-party, and did not con-

trol, but only explained the contract, which ought to be construed with reference to the usage at the port of loading: also that the custom was reasonable and good in law.

(a) 10 Exch. 809.

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cargo; but the defendant's undertaking is to load, not a full and complete cargo of sugar and molasses, but a full and complete cargo of merchandise. [*Williams, J.*—The only points reserved at the trial were, that the custom was inadmissible in evidence, and was bad in law. *Coleridge, J.*—This is the first appeal under "The Common Law Procedure Act, 1854;" and unless the point was reserved, we are not disposed to hear it argued. *Crompton, J.*—It would be attended with mischief, if a party might lie by, and then raise in this Court a point which was never taken at the trial, and consequently not argued in the Court below.] The point is open under the objection that evidence of the custom was inadmissible; for it was inadmissible, because it was irrelevant to the subject-matter.—Secondly, the contract must be construed according to the usage of the place where it was made, and not of the place where the vessel was loaded. It is proposed to alter the terms of the contract by evidence of a custom at the port of loading, but that would be to make the meaning of the contract depend on the place at which the vessel might happen to load. It is conceded that the custom of the port of loading must regulate the mode of packing particular merchandise; but if, when properly packed, it does not make up a full and complete cargo, the charterer must load other produce.—Thirdly, the custom controls the written contract, and is therefore not admissible in evidence. *Brown v. Byrne* (a) was relied on in the Court below, but in the marginal note of that case the word "explained" should be substituted for "controlled." *Alderson, B.*, in delivering the judgment of the Court, says (b): "If the word means to *alter* the effect of that which was clearly expressed on the bill of lading, we think that evidence of the custom was not admissible for that purpose; but if the word 'controlled' was used (as it probably was) in the sense of *explain*, it is perfectly right."

(a) 3 E. & B. 703.

(b) 10 Exch. 815.

—Lastly, the custom is unreasonable; for its effect is to render an incomplete cargo a full and complete cargo, and consequently to deprive the shipowner of a portion of his freight.

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Hugh Hill (*J. Henderson* with him) for the respondent. —By the terms of the contract, the charterer had the option of loading sugar and molasses either with or without any other produce, and it was proved that he loaded a full and complete cargo of sugar and molasses packed in hogsheads and puncheons. *Moorsom v. Page* (a) is an authority that the charterer was not bound to furnish other produce, but only to load a full and complete cargo of sugar and molasses. Then according to the usage of trade at the port of loading, a full and complete cargo of sugar and molasses means a full and complete cargo packed in hogsheads and puncheons. There is nothing unreasonable in such a custom, for it was proved that sugar and molasses packed in that manner are brought home more conveniently and with less loss to the merchant. The custom does not control the contract, but merely explains it. In *Benson v. Schneider* (b), the custom of compressing bales of cotton-wool, to improve their stowage, was peculiar to the port of loading. The rules of law as to the admissibility of the usages of trade to explain written contracts are laid down in *Hutton v. Warren* (c), *Spartali v. Benecke* (d), and *Brown v. Byrne* (e). When the parties entered into a contract by which the vessel was to be loaded at a West Indian port, they must be taken to have contracted with reference to the custom of that port. No wrong is done to the shipowner, for he may protect himself by stipulating for broken stowage.

(a) 4 Camp. 103.

(d) 10 C. B. 212.

(b) 7 Taunt. 272.

(e) 3 E. & B. 703.

(c) 1 M. & W. 466.

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Bramwell replied.

COLERIDGE, J.—We are all of opinion that the judgment of the Court below is right. The first question is, whether the custom relied on is applicable to the state of facts? In order to try that, I will assume for the present that the custom is good in law, and was properly received in evidence; and that being so, we have a right to construe this as a contract to load a full and complete cargo, according to the usual mode of stowage of sugar and molasses or other produce, so that the charterer would have the option of loading sugar and molasses either with or without other produce. Then if the contract is to be so understood, the evidence shews that the defendant did load a full and complete cargo of sugar and molasses according to the custom; and therefore the custom is applicable. That brings us to consider the construction of the contract, whether the custom is good and admissible in evidence to explain the contract. As to the custom being reasonable, we have heard nothing against the opinion of the Court below, that “the custom is a reasonable custom, because it enables sugar to be carried in a way most advantageous to the merchant, and the other party is not without his remedy.” Then it is said that the contract must be construed according to the usage of the port of London, where it was made. But there is no usage at the port of London as to loading sugar and molasses; and the question is, whether, when the parties contracted at London, they did not mean that the contract was to be performed according to the custom at the port of loading? That brings us to the last consideration, viz. whether the custom controls or is inconsistent with the contract, or is merely explanatory of it? We think that the custom does nothing more than explain the meaning of the term “full and complete cargo.” For

these reasons, we agree with the judgment of the Court below.

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CRESSWELL, J., added.—After taking the first step, and saying that under this contract the charterer had a right to elect whether he would load a full and complete cargo of sugar and molasses alone, all the rest follows. Therefore, the contract must be read as if the charterer had undertaken to load a full and complete cargo of sugar and molasses without any other things; and that means a full and complete cargo according to the custom at the port of loading.

Hugh Hill applied for costs under the 42nd section of "The Common Law Procedure Act, 1854."

PER CURIAM.—The judgment must be affirmed, with costs.

Judgment accordingly.

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June 30.

REES v. WATTS, Administrator of J. WATTS, deceased.

To an action by an administrator, who sues in his representative character for a debt due after the death of the intestate, the defendant cannot set off a debt due to him from the intestate in his lifetime. So held in the Exchequer Chamber, affirming the judgment of the Court of Exchequer.

ERROR, by the defendant, on the judgment of the Court of Exchequer for the plaintiff in the case of *Watts v. Rees* (a).—The pleadings are fully stated in the report of the case in the Court below.

Bovill argued (b) for the plaintiff in error (the defendant below) in Trinity Vacation, 1854 (July 3).—This is a case of “mutual debts between the plaintiff and defendant,” within the meaning of the 2 Geo. 2, c. 22, s. 13. The principle on which the right of set-off under that statute depends, is explained by *Parke, B.*, in *Forster v. Wilson* (c). The object of the enactment was to prevent cross actions, and whenever a cross action is maintainable, the debt may be set off. This declaration charges the defendant with receiving the money of the intestate, not of the plaintiff. In some cases an administrator has the option of suing either in his representative or his personal character: *Jenkins v. Plombe* (d); and if he elects to sue in the former, the defendant may set off a debt due to him from the testator. In *Shipman v. Thompson* (e) the executor sued in his own name for money received by the defendant after the death of the testator, and on that ground it was held that the case was not within the statute. *Schofield v. Corbett* (f), which is relied on by the other side, was decided on the authority of two cases referred to in a note in *Willes*, 264, *Tegetmeyer v. Lumley*, *Kilvington v. Stevenson*; but in *Mardall v. Thelluson* (g) Lord Campbell, in delivering the

(a) See the case, 9 Exch. 696.

(b) Before *Coleridge, J.*, *Maule, J.*, *Wightman, J.*, *Cresswell, J.*, *Erle, J.*, *Williams, J.*, *Crompton, J.*, and *Crowder, J.*

(c) 12 M. & W. 191.

(d) 6 Mod. 92, 181; 1 Salk. 207.

(e) *Willes*, 103.

(f) 11 Q. B. 779; 6 N. & M. 527.

(g) 21 L. J., Q. B., 410.

judgment of the Court, observes that "upon examination those authorities do not appear to support the position contended for." In *Mardall v. Thelluson* it was held, that where a defendant is sued as executor, for a debt due from the testator in his lifetime, he may set off a debt which accrued to him as executor since the death of the testator. The only difference between that case and the present is, that the position of the parties is reversed, but that cannot affect the principle. One objection to this plea in the Court below was, that if allowed it might defeat the due administration of assets, but the statute must be construed according to its meaning and not with reference to any supposed inconvenience. [*Williams, J.*—If the declaration had alleged that the money was received to the use of the testator in his lifetime, precisely the same question would have arisen as to the administration of assets. *Coleridge, J.*—It is clear that there are some cases within the statute, though the course of the distribution of assets would be affected. *Maule, J.*—The contract alleged in the declaration is a contract between the plaintiff and the defendant; but the defendant seeks to set off a debt arising from a contract between him and the intestate.] The meaning of the declaration is, that, after the death of the intestate, the defendant received money which accrued due from a contract between the defendant and the intestate in his lifetime. [*Maule, J.*—The law implies a new contract between the plaintiff and the defendant. Formerly, there would have been no doubt; because the plaintiff would have stated that the defendant was indebted to him, and in consideration of the premises the defendant promised to pay him.] It is consistent with this declaration that the money was received in the lifetime of the intestate. Where money has been received by a banker and remains in his hands after the death of the owner, if his executor does not sue upon the new implied contract, but in his repre-

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sentative character, the defendant may set off a debt due from the testator to him.

Pashley for the defendant in error (the plaintiff below). —Reading the statute according to its ordinary meaning, this debt cannot be set off. The first branch of the section applies to mutual debts between the plaintiff and defendant. The section then provides for the case of executors and administrators, and enables them to plead a set-off, "where there are mutual debts between the testator or intestate and either party." The general words of the first part of the section are restrained where either the plaintiff or defendant is executor or administrator. In *Mardall v. Thelluson* (a) the Court of Queen's Bench treated the first part of the section as if it applied generally to all cases. But the term "mutual debts" cannot apply to debts which are not mutual at the time of action brought, notwithstanding they might have been mutual before the death of the testator or intestate. Here the plaintiff is suing as administrator on a contract made between himself and the defendant. [*Erle, J.*—Suppose an action by an administrator on an account stated between him and the defendant in respect of monies received by the latter in the lifetime of the intestate, could not the defendant set off a debt due to him from the testator?] That would not be a case of "mutual debts" within the first branch of the section, inasmuch as the action is founded on a new consideration moving from the administrator. *Blakesley v. Smallwood* (b) is distinguishable, because that was an action against the defendant as executor, on an account stated by him as executor, and therefore it must have been in respect of a debt due from the testator in his lifetime. But in that case it was admitted that the law was correctly stated in Williams on Executors, p. 1596, 4th ed., viz.

(a) 21 L. J., Q. B., 410.

(b) 8 Q. B. 538.

that "in an action *by* an executor in his own name to recover money due to the testator in his lifetime and received by the defendant after his death, the defendant cannot set off a debt due from him to the testator. [*Williams*, J.—If it were otherwise, the executor might be rendered liable for a *devastavit*, for in the case of an insolvent estate, a party by pleading a set-off would get his debt paid in full.] *Schofield v. Corbett* (a) is an express authority that this plea is bad. *Shipman v. Thompson* (b) and *Tegetmeyer v. Lumley* (c), are referred to in *Dale v. Cooke* (d), where Chancellor *Kent* says, "It is an established rule in the Courts of law, that, if executors sue for a debt created to them since the testator's death, the defendant cannot set off a debt due to him from the testator."—He also referred to *Houston v. Robertson* (e), and Selwyn's N. P. p. 155, 11th ed.

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Bovill replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

COLERIDGE, J.—The question in this case arises on a demurrer to a plea of set-off. The plaintiff sues for money of the intestate had and received by the defendant to the plaintiff's use as administrator, for interest upon the forbearance of money due to the plaintiff as administrator from the defendant, and by the plaintiff forborne to him at his request, and for money due from the defendant to the plaintiff as administrator on accounts stated between them. In answer to a portion of the amount demanded, the defendant by his third plea seeks to set off money lent by himself to the intestate, work done and materials provided

(a) 11 Q. B. 779; 6 N. & M.
 527.

(b) *Willes*, 103.

(c) *Willes*, 264, note.

(d) *Johnson's Chanc. Cas.* 11.

(e) 4 *Camp.* 342.

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by himself for the intestate, and money due from the intestate to him on accounts stated between them. To this plea the plaintiff has demurred. Judgment passed in the Court below for the plaintiff, and we are of opinion that that judgment ought to be affirmed.

The words of the statute upon which the question in the cause depends are these: "Where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator where there are mutual debts between the testator or intestate and either party, one debt may be set against the other." The expressions are not very happily chosen, but the meaning seems to us very clear. The case of mutual debts was to be provided for, and the necessity for cross actions in such cases put an end to. In the first branch of the sentence the simplest case is mentioned—that of mutual debts between two living persons—that is, of debts existing between them, contracted respectively in their individual character. In the second, the case supposed is that of one of these mutual debtors dying and being represented by an executor or administrator, in which case such representative will stand, in relation to the survivor if suing or being sued, exactly in the same situation as his testator or intestate would have stood in, and the same right of set-off is given. In this latter case, it is quite as necessary as in the former, that the debts should originally have existed between the two living parties. The executor or administrator to come within the statute must sue or be sued necessarily in his representative character: if not, although he may be called executor, he is really a third party introduced (whereas it is essential that there should be only two concerned), and the mutuality of the debts, without which there can be no set-off, does not exist. Whether the statute in either of its branches extends beyond its mere words to the case of two mutual debtors, both dying, and the representative of one suing the representative of the other, it is not necessary now to decide. In the present

case the defendant asserts that he has lent money to the intestate, whom the plaintiff represents as administrator. This, then, was a debt originally existing between the defendant and the intestate. The plaintiff alleges that the defendant owes him money for money had and received by him, the defendant, to the use of the plaintiff *as administrator*. This, then, is a debt originally existing between the plaintiff and defendant themselves. The money was not received to the use of the intestate. The intestate had no claim on the defendant in respect of this receipt, which took place after his death. He and the defendant, so far as appears, never stood in the relation of mutual debtors to each other, and consequently there is no set-off between the one and the representative of the other.

This, we think, would be the obvious conclusion to be drawn from the language of the statute; and it is not denied, that, on a review of the decisions, beginning from within a few years after the passing of the statute down to and including *Schofield v. Corbett* (a), decided in 1836, there is a decisive preponderance of authority in accordance with this conclusion. Two later cases in the Court of Queen's Bench have been relied on as supporting a different interpretation: these are *Blakesley v. Smallwood* (b), and *Mardall v. Thelluson* (c). It is very doubtful whether the former of these cases is at all inconsistent with the former decisions. Upon reference to the report, it appears that at least nothing was intended to be decided in it at all conflicting with them. It was an action against an executor on an account stated with him of monies due from him as executor; and it was held that to this might be pleaded a set-off for debts due from the plaintiff to the testator in his lifetime. Mr. *Peacock*, in support of this, did not deny the rule laid down in *Williams' Exors.* 1596, 4th edit., that "in an action by an executor in his own name to

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(a) 11 Q. B. 779; 6 N. & M.
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(b) 8 Q. B. 538.

(c) 21 L. J. Q. B., 410.

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recover money due to the testator in his lifetime, and received by the defendant *after his death*, the defendant cannot set off a debt due to him *from the testator*." But he said "if it is merely a statement of account in respect of liabilities of the testator (and it is difficult to conceive any other statement made by a party as executor), there is a *mutual credit shewn between the testator and plaintiff*." And this was the foundation mainly relied on by Lord Denman in giving the judgment of the Court; and in this he was borne out by the dictum of *Holroyd, J.*, in *Ashby v. Ashby* (a), who said, that on such a count the only *evidence admissible* would be an account of debts due from the testator. Whether, on the whole, the decision was correct or not is immaterial to the present argument, for it is only an authority to this extent—that an account stated by an executor as such, must be taken to shew a debt due from his testator to the other party, and against this it is clear that a debt due from that other party to the testator may be set off.

Mardall v. Thelluson and Others, Executors of Theobald, is not, however, so easily disposed of. There it was held that defendants, being sued as executors for a debt which accrued due from the testator in his lifetime, might set off a debt which accrued due from the plaintiff to them as executors since the death of his testator. In the course of the argument, Lord Campbell pointed out "that the declaration alleged the testator to be indebted to the plaintiff, and the plea did not allege that the plaintiff was indebted to the testator, but to the defendants as executors, and therefore that the debt did not seem to be mutual." In the judgment, however, subsequently delivered, this view was abandoned; and it was held that these debts were mutual within the meaning of the first clause in the statute.

(a) 7 B. & C. 444.

We think this case not rightly decided. The principle on which the judgment mainly proceeds appears to be, that unless the set-off be admitted, the plaintiff, being a debtor to the estate and wrongfully withholding the payment, may recover the debt due to himself out of the estate, and so disturb the assets; while he leaves the executor to the risk and costs of an action for recovering the equivalent debt from him. But considerations of this kind do not alter the construction of the statute; neither the words nor the spirit of it lead one to think that they were at all present to the mind of the legislature; and *Shipman v. Thomson* (a) is an authority against such a view.

We are therefore compelled to abide by the more natural construction of the statute, and the authorities older and more numerous, and to dissent from this later and single case. Our judgment, therefore, will be for the defendant in error.

Judgment affirmed.

(a) Willes, 106, n. (a).

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REYNOLDS v. PETO.

The defendant's agent at Cameroons in Africa, made and delivered to the plaintiff an instrument in the form of a foreign bill of exchange, payable *at sight*. The bill was not addressed to any one, but across it the defendant's agent wrote the word "accepted," and the defendant's name and address. The plaintiff presented the bill to the defendant, and requested its payment, when the defendant denied that he owed the amount, but admitted the signature to be that of his agent. The plaintiff then said, "As you acknowledge the signature, you had better pay the bill." The defendant replied, "I'll pay the bill, but I cannot pay it now: I'll give you a bill at three months." The plaintiff then said, "There is something suspicious about it; it is almost a forgery; you had better pay it at once." The defendant replied, "I'll pay the bill; I cannot pay it now, but I will give my note or bill for it at three months."—*Held*, in the Exchequer Chamber (assuming the instrument to be a bill of exchange), that there was no evidence of an acceptance of it.

BILL of exceptions to the ruling of *Coleridge, J.*, in the case of *Peto v. Reynolds (a)*.—The first count of the declaration stated, that one A. Righton, on the 3rd of September, 1852, in parts beyond the seas, at Cameroons, Africa, made his bill of exchange, now overdue, in three parts, and directed the same to the defendant; and by that his third of exchange requested the defendant, at sight of that his third of exchange (the first and second of the same tenor and date being unpaid), to pay to the plaintiff or order the sum of 200*l.*; and the said A. Righton delivered the said third part to the plaintiff, and the defendant had sight of and accepted the said third part, but did not pay the said bill, or any of the parts thereof.

Plea—That the defendant did not accept the said bill of exchange; upon which issue was joined.

The cause was tried at the Bristol Summer Assizes, 1854, when the plaintiff gave in evidence the following unstamped instrument:—

"Exchange for 200*l.*

"Cameroons, Sept. 3, 1852.

"At sight of this my third of exchange, the first and second of the same tenor and date being unpaid, please pay to S. M. Peto, Esq., or order, the sum of two hundred pounds sterling, for value received, and place the same, as by letter of advice of 3rd Sept., to the account of

"ALFRED RIGHTON."

(a) See *Peto v. Reynolds*, 9 Exch. 410.

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The above instrument was written and made at Cameroons, in Africa, by A. Righton; and the words "accepted," &c., were written by him at Cameroons. The plaintiff called a witness, who deposed that he was treasurer to the Baptist Missionary Society; that, on the 18th of January, 1853, he went with the bill to the residence of the defendant, and told him that he (the witness) called for payment of a bill of 200*l*. The defendant said that he did not owe 200*l*., nor anything like it. The witness asked the defendant if he knew any one in Africa; the defendant said he had a son-in-law there with a cargo in a ship of the defendant, that his name was Righton, and that he was captain of the ship. The witness shewed the defendant the aforesaid instrument, and the defendant, after looking at it, said the signature was Righton's. The witness told the defendant that the bill was for a vessel called the "Dove," which the Baptist Society had had in Africa, and which had been purchased by Righton, who paid for it partly in gold dust, and the rest by this bill; that the society had bought this vessel to go among the creeks, and perhaps Righton had bought it for the same purpose. The defendant, in answer, said he supposed that was the case. The witness said to the defendant, "As you acknowledge the signature to be Righton's, you had better pay the bill." The defendant replied, "I'll pay the bill, but I cannot pay it now; I'll give you a bill at three months." The witness then said to the defendant, "There is something suspicious about it; it is almost a forgery; you had better pay it at once." The defendant replied, "It is not convenient to pay cash now; I'll pay the bill; I can't pay it now, but I will give my note or bill for it at three months." The witness then said, "You had better pay it now, or I must return it to London, and then it will be out of my hands; you had better let me hear from you in a day or two." The witness then left the defendant.

The defendant's counsel submitted that the instrument

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was not a bill of exchange, and that there was no evidence for the jury in support of the issue. The learned Judge ruled that there was evidence, and he left the consideration of it to the jury, who found a verdict for the plaintiff. The defendant's counsel having tendered a bill of exceptions to the ruling of the learned Judge, the case was argued in last Easter vacation (a) (May 10), by

Montague Smith (*Prideaux* with him), for the defendant.—First, the instrument in question is not a bill of exchange. (On this point he cited *Peto v. Reynolds* (b); *Reg. v. Hawkes* (c); 1 Chit. Jun. on Bills, p. 1; Pothier, *Contrat de Change*, No. 39, cited in *Miller v. Thomson* (d); *Gray v. Milner* (e), *Davis v. Clarke* (f), *Stoesiger v. South Eastern Railway Company* (g)).—Secondly, assuming the instrument to be a bill of exchange, there was no evidence of an acceptance. In order to constitute an acceptance, there must be an absolute promise to pay the bill according to its tenor and effect. Here the bill was payable at sight; but the defendant said that he could not then pay it, and he offered his note or bill at three months. It is clear that the witness did not understand the defendant as then promising to pay the bill, for the witness replied, "You had better pay it now." [*Maule*, J.—Both parties seem to have treated the matter as in fieri. *Coleridge*, J.—The view which the jury adopted was, that there was an absolute promise to pay the bill; but that as to the time or mode of payment there was a craving of indulgence.] It is the province of the Court to decide whether an acceptance is conditional or absolute: *Sproat v. Matthews* (g). Here was no promise to pay "at

(a) Before *Coleridge*, J., *Maule*, J., *Wightman*, J., *Erle*, J., *Williams*, J., *Crowder*, J.
 (b) 9 Exch. 410.
 (c) 2 Moo. C. C. 60.

(d) 3 M. & G. 576.
 (e) 8 Taunt. 739.
 (f) 6 Q. B. 16.
 (g) 3 E. & B. 549.

sight," and, consequently, no such acceptance as that declared on. It was a mere conditional acceptance, which required the assent of the holder of the bill to render it of any avail. Where the holders of a foreign bill presented it to the drawees for acceptance, which being refused, they protested it for non-acceptance, and on the day when it became due presented it to the drawees for payment, making a charge for the expenses of protesting it, to which the drawees said, "This bill will be paid, but we cannot allow you for duplicate protest," and the holders refused to receive payment without the charges, and afterwards the drawees revoked their offer to pay, it was held that they might well do so, for this did not amount to an acceptance of the bill by the drawees: *Anderson v. Heath* (a). In that case the judgment of Lord *Ellenborough*, C. J., proceeds on the ground, that, up to the time when the drawees revoked their promise to pay, neither of the parties were treating about the acceptance of the bill, but only its payment. So here, the parties were only considering about the payment of the bill; and it would be against their plain intent to hold this an absolute promise to pay amounting to an acceptance.

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Kinglake, Serjt. (*Barstow* with him), for the defendant in error.—[He argued, first, that the instrument in question was a bill of exchange. On this point he cited *Edis v. Bury* (b), *Story on Bills*, sect. 33, *Shuttleworth v. Stephens* (c), *Rex v. Hunter* (d), *Stickland v. Mansfield* (e).]—Secondly, there was sufficient evidence of an acceptance. It was a question for the jury, whether the language of the defendant amounted to a promise to pay the bill, and the jury have found that it did. In *Anderson v. Heath* (a), the drawees had refused to accept the bill when it was present-

(a) 4 M. & Sel. 303.

(d) Russ. & R. C. C. 511.

(b) 6 B. & C. 433.

(e) 8 Q. B. 675.

(c) 1 Camp. 407.

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ed to them for that purpose, and the subsequent conversation related solely to its payment. Days of grace are allowable on bills payable at sight: *Story on Bills*, sect. 342. The defendant in effect said, "I will pay the bill, but I hope that instead of requiring cash you will take another bill in payment."

Montague Smith replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

COLERIDGE, J.—This was an action upon an instrument treated as a foreign bill of exchange, against the plaintiff in error, sued as the acceptor on a supposed part acceptance; and two points were raised for consideration, the first, whether the instrument was indeed a bill of exchange; and if so, the second, whether there was any evidence to go to the jury of an acceptance. At the trial, I thought there was some evidence, but as the Court, after argument and consideration, is of opinion that there was none, the decision upon this second point makes it unnecessary to consider the first, upon which there might be more difficulty. [His Lordship read the evidence.]

The instrument, assuming it to be a bill, was a bill payable at sight; and the acceptance, to prove which this evidence was offered, must have been an acceptance according to its tenor and effect, an agreement to take upon himself the relation of acceptor to *that* bill. Now, looking at the circumstances and taking all that the defendant below says together, it seems to the Court that it would be a perversion of its meaning to understand it in that sense. He does indeed twice use the words, "I'll pay the bill," and if these had stood alone, and seeing that the witness may be taken to have called on him to pay it as acceptor, they would have furnished good evidence of an agreement to accept; but when we look at the circumstances and the context of

the language, it seems to us clearly otherwise. This was not the case of a pre-existing liability or duty. It was entirely at the option of the defendant below to accept or not, and the resolution to which he comes, may be expressed thus —“ From the motives suggested, and the manner in which my son-in-law may be implicated, I will pay the bill, if you will take payment at a future date, or in a bill at three months, but I cannot pay it now.” From language bearing this import, it is obvious that no inference arises of an agreement or intention to become the present acceptor of a bill payable at sight. There must, therefore, be a venire de novo.

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Award of venire de novo.

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Nov. 22.

GRACE v. BISHOP.

The protection from arrest granted to a bankrupt during the suspension of his certificate, does not protect him from arrest in respect of debts contracted since his bankruptcy.

IN 1849 the defendant in this case became bankrupt. On the 5th of May, 1854, it was ordered by the Court of Bankruptcy, that the defendant's certificate be suspended for three years from that date, and that protection be granted to him for six months, to be renewed from time to time for the same period, if no cause be shewn to the contrary. His protection was accordingly renewed up to the 5th of November, on which day, at 12 o'clock, it expired; and at 11 o'clock the defendant was taken in execution on a judgment obtained by the plaintiff, as the holder of a bill of exchange accepted by the defendant since his bankruptcy.

Prideaux moved (Nov. 10), on an affidavit of the above facts, to discharge the defendant out of custody.—The 112th section of "The Bankrupt Law Consolidation Act, 1849," enacts, "That, if the bankrupt be not in prison or custody at the date of the adjudication, he shall be free from arrest or imprisonment by any creditor in coming to surrender and after such surrender during the time by this Act limited for such surrender, and for such further time as shall be allowed him for finishing his examination, and for such time after finishing his examination until his certificate be allowed as the Court shall from time to time, by

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indorsement on the summons of such bankrupt, think fit to appoint." The object of the protection is to enable the bankrupt to appear before the Court when called upon by the assignees. So long as he remains uncertificated he is liable to be examined as to his earnings, which belong to his creditors. Unless cause is shewn to the contrary, the Court is bound, from time to time, to renew the protection. [*Martin*, B.—If the whole section be read, it will be found that the legislature is treating of a bankrupt having debts under the control of the commissioners. It could never have been intended that an uncertificated bankrupt should go on contracting debts, and that his creditors should have no remedy either against his property or his person.] In *Darby v. Baugham* (a), it was held, that the acceptor of a bill of exchange, which becomes due and is paid by him after the bankruptcy of the drawer, cannot arrest the drawer during the time allowed him by 5 Geo. 2, c. 30, s. 5, for attending the commissioners to be examined. [*Platt*, B.—In that case the debt was provable under the commission.] The 198th section enables the Court of Bankruptcy either to allow the certificate "or refuse or suspend the allowance thereof, or annex such conditions thereto as the justice of the case may require." Here the Court has suspended the certificate, and has annexed, as a condition, the protection of the bankrupt from arrest. [*Alderson*, B.—That section must be read as if the words were "conditions within the jurisdiction and power of the commissioners." They may have power to annex conditions binding on the creditors under the fiat, but it is different with respect to creditors who are not before the Court.]

Cur. adv. vult.

POLLOCK, C. B., now said—In this case it appeared, that in 1849 the defendant had become bankrupt, and that he

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had previously conducted himself so little to the satisfaction of the commissioner, that he suspended the defendant's certificate, but granted him protection from arrest. Whilst the defendant was thus uncertificated, he accepted a bill of exchange, and the plaintiff, who was the holder, obtained judgment in an action on the bill, and took the defendant in execution. The defendant applied to be discharged out of custody, on the ground that he was protected from arrest,—or, in other words, that he was protected from liability for every species of debt, because some years before he was a bankrupt, and had so misconducted himself that his certificate was suspended. If we were to entertain such an application, a fraudulent bankrupt would be privileged to run in debt without the slightest personal responsibility, and would in fact be in a better position than if he had conducted himself to the satisfaction of the commissioner and had obtained his certificate. We are of opinion that, if an uncertificated bankrupt accepts a bill of exchange which is dishonoured, and judgment is obtained against him, he is liable to be taken in execution. If he were not liable, the creditor would have no remedy, for the bankrupt, being uncertificated, can have no property, since it vests in his assignees. We are of opinion that the commissioner had no jurisdiction to protect him from this debt, and that, therefore, he is not entitled to be discharged.

Rule refused.

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WORMS v. STOREY.

Nov. 23.

DECLARATION on a charterparty, whereby it was agreed between the plaintiff and defendant that the defendant's vessel, called the "Army," then in Penarth Roads, being tight, staunch, and strong, and every way fitted for the voyage, should, with all convenient speed, sail and proceed to Bute Dock, Cardiff, and there load in turn, not exceeding twelve days after ready, in the usual and customary manner, from the factors of the plaintiff, a full and complete cargo of Mayner's steam coal, and being so loaded should therewith proceed to Havre, and deliver the same to the order of the plaintiff on being paid freight, &c. (the act of God, the Queen's enemies, fire, and all and every other unavoidable hindrances, dangers, and accidents of the seas, rivers, and navigation, riots and strikes of the pitmen, of whatever nature or kind soever, during the said voyage always excepted). And, although the said vessel proceeded to Bute Dock, Cardiff, and there loaded from the factors of the plaintiff a full and complete cargo of Mayner's steam coal, and afterwards proceeded on her said voyage to Havre; and although the defendant was not prevented by any of the matters of excuse mentioned in the charterparty from performing his said contract, and although, after the commencement of the voyage, the said vessel was greatly damaged by the dangers and accidents of the seas, and the defendant had notice that the said vessel then was unsea-

If a chartered vessel is seaworthy at the commencement of the voyage, but is afterwards damaged by perils of the sea, though the owner is not bound to repair the vessel, yet if he elects not to do so, he ought not to proceed with the vessel in an unseaworthy condition.

A declaration on a charterparty (which contained an exception of "all unavoidable hindrances, dangers, and accidents of the seas") alleged as a breach, that, although after the commencement of the voyage the vessel was damaged by the dangers and accidents of the seas, and was unseaworthy, and was in a place

where she could have been repaired, of all which the defendant then had notice, yet the defendant did not cause the vessel to be repaired, and carelessly and negligently caused the vessel to proceed on her voyage in an unseaworthy state, and by reason of the premises the vessel was unable to meet the perils of the sea, and a large quantity of the plaintiff's goods was obliged to be thrown overboard:—Plea, that at the commencement of the voyage the vessel was tight, staunch, and strong, and every way fitted for the same, and was seaworthy:—*Held*, on demurrer, that the breach disclosed a good cause of action, and that the plea afforded no answer to it.

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worthy, and the said vessel then was in a place where she could and might and ought to have been repaired before she proceeded on her said voyage, of which the defendant then had notice, yet the defendant did not cause the said vessel to be repaired before she proceeded on her said voyage, and the defendant carelessly and negligently caused the said vessel to proceed on the said voyage with the said coals on board in an unseaworthy state and condition; and by reason of the premises, the said vessel was unable to meet the perils of the seas as she otherwise would have been, and a large quantity of the coals of the plaintiff were obliged to be thrown overboard.

Plea.—That, at the commencement of the said voyage, the said vessel was tight, staunch, and strong, and every way fitted for the same, and was seaworthy.

Demurrer and joinder therein.

Mellish in support of the demurrer.—The question is, whether, taking the facts alleged in the plea in connection with the breach in the declaration, there is a good cause of action. It is submitted that there is. At the commencement of the voyage the vessel was seaworthy, but in the course of the voyage was damaged by perils of the seas; and, although the owner had notice of that fact, and that the vessel might have been repaired, yet he proceeded on the voyage with the unseaworthy vessel, whereby the plaintiff's goods were lost. It was the duty of the shipowner safely to carry and deliver the goods at Havre; and not having done so, he is responsible, unless the non-performance of his contract is excused by some of the exceptions in the charterparty. This, however, is not a loss arising from "unavoidable accident," but from the negligence of the shipowner in proceeding with an unseaworthy vessel. Suppose a leak had sprung in the side of the vessel in such a position, that by lightening it the leak would be above water, if the master had an opportunity of repairing the

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leak, he would not be justified in throwing the cargo overboard. Or, suppose the cargo was slightly damaged by salt water, but by reasonable care might be preserved, the master would not be justified in taking no care of it, because the damage had arisen from a peril of the seas. [*Parke, B.*—The plea is clearly bad. The owner discharges his duty if he sails with a seaworthy vessel, and, therefore, if the vessel is afterwards damaged by perils of the seas, he is not bound to repair it; but, if he does not choose to repair the vessel when he has the opportunity, he ought not to proceed with it in an unseaworthy state.] *Laurie v. Douglas* (a), shews, that although a cargo is damaged by perils of the seas, the shipowner is bound to take reasonable care of it. Here, the conduct of the owner in proceeding with the vessel in an unseaworthy state was in direct breach of his contract safely to carry the goods.—He also referred to *Dixon v. Sadler* (b).

Manisty contra.—The breach is bad. The *immediate* cause of the loss was the perils of the sea, and it is attempted to bring back the loss to the next prior cause, viz. the state of the vessel. It is not alleged that the vessel was in port, and proceeded from thence in an unseaworthy state. The defendant was only bound to do what a prudent owner would do; and he discharged his duty when he sent the vessel to sea in a seaworthy state, and with a competent master and crew. If the defendant could have recovered on a policy of insurance against losses by perils of the seas, the plaintiff cannot maintain his action. [*Parke, B.*—In the case of insurance the shipowner does not lose the benefit of the insurance by the misconduct of the master; as, for instance, if he were to get drunk, and thereby cause the loss of the vessel; but, in this case, the act of the master is the act of the owner.] The defendant only undertook to carry and deliver the goods subject to certain exceptions, and this

(a) 15 M. & W. 746.

(b) 5 M. & W. 405; 8 M. & W. 895.

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case falls within one of them, viz. loss by "unavoidable accident."—He also cited *Hollingworth v. Brodrick*(a).

PARKE, B.—It is clear to my mind that the breach is sufficient. Under a charterparty containing such an exception, if the vessel sails in a seaworthy state, and in the course of the voyage is damaged by perils of the sea, the owner is not bound to repair it; but, if he does not choose to repair, he ought not to go to sea with the vessel in an unseaworthy state, and so cause a loss of the cargo. He ought either to repair or stop. In this case it is alleged that the defendant negligently caused the vessel to proceed in an unseaworthy condition, and thereby caused a loss of the goods. In order to make out negligence, it must be proved that he proceeded with the vessel in such an unseaworthy state, that he was obliged to throw the goods overboard. If so, the loss was the consequence of the wrongful and negligent act of the defendant, and for that he is responsible. There must therefore be judgment for the plaintiff.

POLLOCK, C. B., and PLATT, B., concurred.

Judgment for the plaintiff.

(a) 7 A. & E. 40.

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JOHNSON v. DIAMOND.

Nov. 24.

THE above-named plaintiff having obtained judgment in an action brought against him by one Courtis, a rule was made absolute that he be at liberty to proceed against the above-named defendant, garnishee, under the 64th section of the Common Law Procedure Act, 1854. A writ was accordingly issued, and the plaintiff having declared, the defendant demurred to the declaration, and obtained judgment, but no mention was made of costs (*a*). The defendant proceeded to tax his costs; but the plaintiff objected before the Master that he had no power to tax, inasmuch as the Court had not awarded costs under the 67th section. The Master was of opinion that the defendant was entitled to costs, and taxed them; whereupon

The costs of proceedings by writ of garnishment under the 64th section of the "Common Law Procedure Act, 1854," are in the discretion of the Court; but if liberty is given to issue the writ, without any order as to costs, the successful party is entitled to them.

Maynard obtained a rule calling on the defendant to shew cause why the Master should not review his taxation; against which

Kingdon shewed cause.—The defendant, having succeeded in the garnishment suit, is entitled as of right to his costs. The 60th section of the "Common Law Procedure Act, 1854," enables a judgment creditor to obtain an order for the oral examination of the judgment debtor as to what debts are owing to him. By section 64, "If the garnishee disputes his liability, the Judge, instead of making an order that execution shall issue, may order that the judgment creditor shall be at liberty to proceed against the garnishee by writ, calling upon him to shew cause why there should not be execution against him for the alleged debt, or for the amount due to the judgment debtor if less than the judg-

(*a*) See the case, ante, p. 73.

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ment debt, and for costs of suit; and the proceedings upon such suit shall be the same, as nearly as may be, as upon a writ of revivor issued under "The Common Law Procedure Act, 1852." The 131st section of that Act prescribes the mode of proceeding by writ of revivor, and declares that "the pleadings and proceedings thereupon, and the rights of the parties respectively to costs, shall be the same as in an ordinary action." Therefore, if those enactments had stood alone, the successful party would be entitled to costs. The plaintiff however relies on the 67th section of "The Common Law Procedure Act, 1854," which enacts, that "The costs of any application for an attachment of debt under this Act, and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court or a Judge." But that enactment only applies to proceedings which are preliminary to the suit, as, for instance, the examination of the judgment debtor (sect. 60), the attachment of the debt, and rule calling on the garnishee to shew cause why he should not pay the judgment creditor the debt due from him to the judgment debtor (sect. 61), and the execution (sect. 63). When proceedings are commenced against the garnishee by writ, under the 64th section, the right of the parties to costs is the same as in an ordinary action. If, however, it is necessary that the Court should exercise its discretion as to giving costs, it has done so when it allowed the writ of garnishment to issue.

The Court then called on

Maynard to support the rule.—The 131st section of "The Common Law Procedure Act, 1852," says, that the pleadings and proceedings on a writ of revivor, "*and the rights of the parties respectively to costs,*" shall be the same as in an ordinary action. The 64th section of the "Common Law Procedure Act, 1854," merely says that the "*proceedings in such suit*" shall be the same as on a writ of revivor, omitting all mention of costs. There must have

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been some reason for the adoption of one portion of the previous enactment, and the exclusion of the other. In the 70th section distinct provision is made not only for the proceedings, but also for the costs in an action for mandamus. If it had rested there, the inference would have been strong that the legislature never intended that the successful party in a garnishment suit should have costs without an order of the Court. But, further, the 67th section expressly provides that the costs of "any proceedings arising from or incidental to such application" shall be in the discretion of the Court or a Judge. It is no new provision which makes it incumbent on a party to apply to the Court for costs. Under the 43 Geo. 3, c. 46, s. 4, the plaintiff in an action on a judgment cannot get his costs except by leave of the Court. So also in cases within the County Courts Act, 15 & 16 Vict. c. 54, s. 4. The order that the judgment creditor be at liberty to proceed against the garnishee cannot be considered as an order for costs. If the party is not entitled to costs, a rule of Court giving them would be ultra vires: *Fisher v. Bridges* (a). Statutes which give costs should be construed strictly: *Cone v. Bowles* (b). [*Alderson, B.*—Where a Court of equity directs a feigned issue, the costs are in the discretion of the Court; but where an action is directed the costs follow the event.]

It having been intimated to the Court that a similar question was pending in the Court of Queen's Bench, in a case of *La Forest v. Flavell* (c), this case stood over that

(a) 4 E. & B. 666.

(b) 1 Salk. 204.

(c) In this case—

Vernon Harcourt (Nov. 12) obtained a rule calling on the plaintiff to shew cause why the Master should not tax the defendant's costs of a garnishmentsuit. *Needham* shewed cause (Nov. 26), and

objected that the application was premature, since a point was reserved at the trial which was not yet disposed of. It was ultimately arranged that a special case should be stated for the opinion of the Court.—*Ex relatione Blackburn.*

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inquiry might be made on the subject; and on a subsequent part of the day,

POLLOCK, C. B., said—The rule must be discharged. According to the practice in Courts of equity (*a*), where the Court has given the liberty of bringing an action at law, which in its form imports the carrying of costs, the successful party is entitled to costs unless the order of the Court deprives him of his right. That being the principle, we are now called upon to say whether the defendant in this case is entitled to have his costs taxed. I am of opinion that he is, and that there is no occasion for the Court to exercise any discretion on the subject.

ALDERSON, B.—On inquiry we find that the case referred to as pending in the Court of Queen's Bench is one in which the Master has refused to tax the costs, and that the application is to order him to do so. Now, it may be that he is required to tax on the ground that by the order to try the question in the form mentioned, it must be treated as if an order has been made, or if not, it may be that the application is to the Court not to exercise its discretion, but to order the Master to tax the costs. Therefore the question is open, and we are not concluded by authority. The true principle seems to me to be that enunciated by the Lord Chief Baron, viz. that the costs of the proceedings are in the discretion of the Court; but if the Court has directed an action *simpliciter*, the costs follow the event. It is competent, however, for the Court to say, in directing the action, that the proceedings shall be without costs. It is to be observed that they do not direct the judgment creditor to issue the writ against the garnishee, but only *give him liberty* to do so, and it may be that under the peculiar circumstances the Court may think the costs ought not to

(*a*) See Seton on Decrees, 523, Prac. 517, 5th edit.; Daniell's 512, 2nd edit.; Smith's Chanc. Chanc. Prac. 1089.

abide the event, and may so give a qualified permission to issue the writ. If however the Court do not make any such direction as to costs, they must be considered as ordering costs when they allow the writ to issue. For it is the natural result of the proceedings that the costs should abide the event of it.

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PLATT, B.—I am of the same opinion. Mr. *Maynard* says that there must have been some reason for the omission to mention costs in the 64th section of "The Common Law Procedure Act, 1854;" and he argues, that, because the language of that and the 131st section of the former Act is different, the legislature could never have intended to give costs. Now, it is to be observed that the 131st section has the words "pleadings and proceedings," whereas the 64th section uses the words "proceedings" only. But "proceedings" must include "pleadings," for the suit cannot go on without them. In like manner, although costs are not mentioned, they are incidental to the proceedings in the suit.

MARTIN, B.—I am of the same opinion. When the Court ordered that the judgment creditor should be at liberty to proceed against the garnishee, without giving any direction as to costs, it exercised its discretion by saying that whichever party was successful in that litigation should have his costs.

Rule discharged.

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Nov. 26.

THATCHER v. D'AGUILAR.

On an application by a defendant, to stay proceedings on the ground that the plaintiff's attorney is going on with the suit contrary to the express direction of his client, the plaintiff should be made a party to the rule.

RAYMOND had obtained a rule calling on the plaintiff's attorney to shew cause why all proceedings in this case should not be stayed. The rule was obtained on an affidavit of the defendant's attorney, which stated that the action was brought for a breach of promise of marriage, and stood for trial at the London Sittings after last Term, but was made a remanet to the present Term. In the meantime the plaintiff wrote a letter to the defendant's attorney, stating that she had written to her attorney desiring him to withdraw the record, and to discontinue all proceedings, and that she wished the defendant's attorney would intimate the same to his client. The plaintiff's attorney refused to withdraw the record unless his costs were paid.

Prentice shewed cause, and objected that the rule only called on the plaintiff's attorney to shew cause, whereas, on such an application, the plaintiff herself ought also to be before the Court.

PARKE, B.—The rule must be discharged. The attorney in a Court of law is not, like a proctor in the Ecclesiastical Courts, the dominus litis, but he is the mere agent of the suitor. We ought not, therefore, to stay the proceedings without having the plaintiff before the Court.

ALDERSON, B.—The rule ought certainly not to be absolute without the plaintiff being called upon to answer.

POLLOCK, C. B., and PLATT, B., concurred.

Rule discharged.

1855.

LEECH v. LAMB.

Nov. 24.

THIS was a rule calling on the defendant to shew cause why a certificate for a special jury should not be set aside.

The cause was tried before Lord *Campbell*, C. J., and a special jury, at the last Stafford Spring Assizes, when a verdict was found for the defendant. Immediately after the verdict was pronounced, the defendant's counsel applied to the learned Judge for a certificate for a special jury, and his lordship verbally granted it, but the associate omitted to indorse the certificate on the record. In Easter Term, a rule nisi was obtained for a new trial, which was not disposed of until the following Trinity Vacation, when a rule was made absolute to enter a nonsuit. On the taxation of costs, it was discovered that no certificate was indorsed on the record, and the matter stood over, in order that an application might be made to Lord *Campbell* for his certificate. On the 14th of August, a summons was taken out for that purpose, and Lord *Campbell*, after hearing the parties, signed the certificate.

A cause was tried by a special jury at the Spring Assizes, 1855, and a verdict found for the defendant. The defendant's counsel then asked the Judge to certify for the special jury, and he consented, but the associate omitted to indorse the certificate on the record. In the following Term, a rule nisi was obtained for a new trial, which was not disposed of until Trinity Vacation. On taxation of costs it was discovered that the certificate was not indorsed on the record, and on application to the Judge on the 14th of August, he signed the certificate:—*Held*, that the certificate was too late, and the Court set it aside.

Pigott shewed cause.—The question turns on the 34th section of the 6 Geo. 4, c. 50, which provides that the party who shall apply for a special jury shall only be allowed the cost of a common jury, “unless the judge before whom the cause is tried shall, *immediately* after the verdict, certify under his hand upon the back of the record, that the same was a cause proper to be tried by a special jury.” The word “immediately” has been construed to mean “within a reasonable time.” *Christie v. Richardson* (a). A similar construction has been put upon the

(a) 10 M. & W. 688.

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word in the 3 & 4 Vict. c. 24. That statute enacts, that if the plaintiff in any action of trespass shall recover less damages than 40s., he shall not have any costs, unless the Judge before whom the verdict was obtained "shall immediately afterwards certify" that the action was brought to try a right; and in *Thompson v. Gibson* (a), it was held that a certificate under that statute was valid, though given by the Judge at his lodgings, after an adjournment of the Court. In *Page v. Pearce* (b), which was also a decision on that statute, the sheriff, on a writ of inquiry, took time to consider whether he would certify, and the Court was adjourned later on the same day, but after the Court again met he granted the certificate, and that was held to be in time. A similar construction has been put on the Wilful Trespass Act, 8 & 9 Will. 3, c. 11, s. 4: *Woolley v. Whitby* (c). Provided the Judge within a reasonable time after the verdict, and whilst the facts are fresh in his mind, consents to grant a certificate, the ministerial act of signing it may be done nunc pro tunc: *Serrell v. The Derbyshire &c. Railway Company* (d). Where, immediately after the trial, an informal certificate was given under the 3 & 4 Vict. c. 24, s. 2, it was held that the Judge might afterwards amend it, it being a misprision of the officer: *Shuttleworth v. Cocker* (e). Here there was a misprision of the associate in not drawing up the certificate, and presenting it to the Judge for signature. In *Davis v. Cole* (f), the Judge at the trial intimated his intention to certify under the 43 Eliz. c. 6, but four days afterwards the plaintiff obtained the record from the associate, no certificate being indorsed on it; and the Court ordered the plaintiff to produce the record, in order that the Judge might indorse his certificate. In *Waggett v. Shaw* (g),

(a) 8 M. & W. 281.

(b) 8 M. & W. 677.

(c) 2 B. & C. 580.

(d) 10 C. B. 910.

(e) 1 Man. & G. 829.

(f) 6 M. & W. 624.

(g) 3 Camp. 316.

where it was held, that, under the 24 Geo. 2, c. 18, a certificate could not be given on the day after the trial, the statute required the certificate to be given in open Court. [*Martin, B.—Grace v. Clinch (a)* is an express authority that this certificate is too late.]

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Keating appeared in support of the rule, but was not called upon to argue.

POLLOCK, C. B.—The rule must be absolute. The case of *Grace v. Clinch (a)* is an authority on this point. That case was tried at the Spring Assizes, 1842, by a special jury, who retired, and, while another cause was going on, brought in a verdict for the defendant. The defendant's counsel immediately applied for a certificate for a special jury; and the Judge verbally granted the application. The associate thereupon indorsed the certificate on the record; but, owing to the hurry occasioned by the trial of the other cause, and the departure of the Judge from the assize town, he did not obtain the Judge's signature to the certificate. In the following Term a rule nisi was obtained for a new trial, which was discharged in Hilary Vacation, 1843. On the taxation of costs, on the 3rd of March, 1843, the record was produced, with the certificate indorsed thereon, not signed by the Judge; but at a subsequent meeting to complete the taxation the record was produced with the Judge's signature to the certificate. The Court of Queen's Bench, however, held that too late, and set aside the certificate. That case is not distinguishable from the present. When a statute requires an act to be done *immediately*, I do not see how we can construe it to mean that the act may be done some weeks afterwards. It is unnecessary to advert to the cases which have been cited; it is enough to say that our decision is in accordance with an authority ex-

(a) 4 Q. B. 606.

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pressly in point. I should have been contented if it had been sufficient for the Judge to intimate his consent at the time of trial, and afterwards to sign the certificate; but as the Legislature has enacted otherwise, we must administer the law as we find it.

ALDERSON, B.—I am of the same opinion. The question in *Thompson v. Gibson* never could have arisen, if the Court had not been disposed to take a literal view of the word “immediately.” Unless we are to lay down that an intention to grant a certificate is the same as granting it, we must decide this case against the defendant.

PLATT, B. and MARTIN, B., concurred.

Rule absolute.

(Before Alderson, B., and Martin, B.)

Nov. 26.

BLEW v. STEINAU.

The defendant, being indebted to the plaintiff in a sum above 20*l.*, before judgment, paid to the plaintiff a sum sufficient to reduce the debt below 20*l.* The plaintiff having signed judgment, and issued a ca. sa. for the whole amount:—*Held*, that the ca. sa. was not a nullity.

PULLING had obtained a rule to shew cause why execution should not be set aside, on an affidavit that the action was brought in April, 1853, for 30*l.* only; that after writ issued the defendant paid to the plaintiff 20*l.* on account; that judgment was afterwards signed; and that defendant was arrested by ca. sa. for the whole amount in September, but discharged on payment of 13*l.* in full of debt and costs.

Griffiths shewed cause.—The writ of ca. sa. was not a nullity. The plaintiff had a good cause of action for a sum above 20*l.*, and recovered judgment. The *irregularity*, if any, was waived by the defendant's laches. The defendant having paid part of the sum due pending pro-

ceedings, allowed judgment to be signed in May for the full amount. Having been arrested in September, he was at once released on payment of the sum really due, and no application was made to set aside the proceedings till November.

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Pulling in support of the rule.—The 7 & 8 Vict. c. 96, s. 57, prohibits the arrest by ca. sa. upon any judgment wherein the sum *recovered* shall not exceed 20*l.* exclusive of costs. It has been decided that the word *recovered* means, not the nominal amount of the judgment, but the sum really due under it: *Harris v. Johnson* (a). Under the Irish Act, limiting the power of arrest (11 & 12 Vict. c. 28), it has been held that a writ of ca. sa. under such circumstances is null and void: *Jack, Lessee of Shulldham, v. Boles* (b). [*Martin, B.*—The Irish Act positively prohibits the issuing a ca. sa. *where the sum due* or to be paid under the judgment does not exceed 10*l.* The words of the 7 & 8 Vict. c. 96, s. 57, are, *where the sum recovered* shall not exceed 20*l.* The plaintiff here recovered judgment for a sum above 20*l.*] At all events, the execution was an irregularity. Rule Hil. T., 1853, no. 76, requires the writ to be indorsed with the sum really due; here it was indorsed for the amount of the judgment.

ALDERSON, B.—The ca. sa. was not a nullity, as it pursued the judgment, and the judgment was right. The plaintiff was guilty of an irregularity in issuing the ca. sa. when less than 20*l.* remained due from the defendant; but the defendant came too late to the Court to have the proceedings set aside. The justice of the case requires that the plaintiff should pay the costs of the present rule; and upon payment of such costs the rule must be discharged.

Rule discharged accordingly.

(a) 15 C. B. 357; *S. C.*, 24 L. J., N.S., C. P., 40. (b) 2 Irish Law Rep., N. S., 140.

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(Before Alderson, B., and Platt, B.)

Nov. 26.

THOMPSON v. TOMKINSON, WEBSTER, and Others.

A person who has recovered judgment in ejectment upon a forfeiture of a lease, but has not actually obtained possession, is not by statute 15 & 16 Vict. c. 76, s. 172, enabled to come in and defend an action of ejectment.

LAXTON, on a former day, had applied for a rule, calling upon the plaintiff to shew cause why William Gilbert should not be at liberty to appear and defend this action, though not named in the writ, under the provisions of stat. 15 & 16 Vict. c. 76, s. 172. It was an action of ejectment. The writ bore date October 23, 1855. The affidavit stated, that, by a lease made in 1821, between Jeremiah Keen of the one part, and Joseph Blunt of the other part, Keen demised the premises in question to Blunt for the term of fifty years, at the annual rent of 3*l.* 3*s.* The lease contained covenants for the payment of rent and to repair, with a proviso for re-entry in case of default. The interest of Keen in the premises had become vested in Gilbert, who on the 17th of May, 1855, brought an action of ejectment against Webster, the tenant in possession, relying on a forfeiture by breaches of covenant; which action Tomkinson defended as landlord. The action was tried on the 8th of November, and a verdict found for the plaintiff; and judgment was signed in the action on the 15th of November. The Master had refused to draw up the rule, on the ground that the affidavit was insufficient. *Laxton* now again mentioned the case to the Court.

ALDERSON, B.—No writ of possession has been executed. The applicant has not obtained possession, and we do not know that he may ever get it.

Rule refused (*a*).

(*a*) See *Croft v. Lumley*, 4 E. & B. 274, 614.

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KING v. THE PARENTAL ENDOWMENT ASSURANCE
COMPANY.

Nov. 26.

BEASLEY had obtained a rule, calling on one Hornby to shew cause why the plaintiff should not be at liberty to issue execution against him as a shareholder for the time being of the Parental Endowment Assurance Company.—In support of the application, there was an affidavit of a clerk to the plaintiff's attorney, which stated "that on the 2nd of May, 1855, the plaintiff obtained a judgment against the company for 75*l.* 19*s.*, which was still due; that the company was completely registered under the 7 & 8 Vict. c. 110; that a writ of fieri facias was issued by the plaintiff on the 3rd of May, 1855, against the goods of the company, and placed in the hands of the Sheriff of Middlesex to be executed, and the sheriff on the 4th of May, 1855, returned nulla bona to the said writ; that at the time when the action was commenced the chief office of the company was closed, and no business was, to the best of deponent's belief, carried on there, and that the same still remains so; and that deponent believes that any writ of execution issued against the property and effects of the company would be wholly unavailing; and that the only chance of obtaining satisfaction of the plaintiff's claim is by proceeding against the individual members of the company." There was an affidavit of one of the directors of the company, which stated "that the business of the company was carried on at No. 24, Leicester-square, in the county of Middlesex, from the 24th of February, 1854 (being the day of complete registration of the company), until near the

An application, under the 7 & 8 Vict. c. 110, by a judgment creditor of a joint-stock company, for leave to issue execution against a shareholder, was founded on affidavits, which stated that a writ of fi. fa. was issued by the plaintiff against the goods of the company, and placed in the hands of the sheriff, to be executed; that the sheriff returned nulla bona; that the chief office of the company was closed, and that no business, to the best of the deponent's belief, was carried on there; and that he believed that any execution against the property and effects of the company, would be wholly unavailing:—*Held*, that the

facts disclosed did not shew that the plaintiff had used due diligence to obtain satisfaction of his judgment by execution against the company, since there was no affidavit of the sheriff's officer shewing what he had done under the writ.

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end of December. 1854, when the offices of the company were closed." There was also an affidavit that Hornby had executed the deed of settlement, and still remained a shareholder; that he had not paid up the full amount of capital on his shares; and that he had been served with notice of the proceeding as required by the 68th section of the 7 & 8 Vict. c. 110.

Hawkins shewed cause (a).—By the 7 & 8 Vict. c. 110, s. 66, a judgment creditor is only authorised to issue execution against the shareholders of a joint-stock company, "if due diligence shall have been used to obtain satisfaction of such judgment by execution against the property and effects of such company." The plaintiff must, therefore, satisfy the Court that he has used due diligence in that respect. These affidavits are insufficient for that purpose. They only state that the chief office is closed; and one of the deponents says that he "believes" that any execution against the company would be unavailing. It is not sworn that the company has no goods upon which the execution might be levied, nor that there are no debts due to the company which could be attached under the Common Law Procedure Act, 1854. No exertions have been used beyond the delivery to the sheriff of a writ of fieri facias. It is indeed said that the sheriff returned nulla bona to the writ, but that may have been done at the request of the plaintiff. There should have been an affidavit of the sheriff's officer, shewing what he did under the writ.

Beasley in support of the rule.—The affidavits are similar to those upon which the rule was obtained in *Thompson v. The Universal Salvage Company* (b). It is sufficient for the plaintiff to disclose a *prima facie* case; and the shareholder ought, in answer, to shew that the com-

(a) Before *Pollock*, C. B., and *Parke*, B.

(b) 3 Exch. 310.

pany has property: *Rastrick v. The Derbyshire &c. Railway Company* (a).

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PARKE, B.—The Court ought not to allow execution to issue against a shareholder, unless they are satisfied that due diligence has been used to obtain satisfaction of the judgment by execution against the company. Now what has been done for that purpose is a matter peculiarly within the plaintiff's knowledge; and therefore he is bound to shew to the Court that he has used all reasonable exertions. Here the principal objection is, that, although a writ of fieri facias issued, it does not appear what was done under that writ. It may be that the return of nulla bona was at the instance of the plaintiff himself. The affidavits are not sufficient to satisfy me that all has been done which might have been done, and, consequently, due diligence has not been used. With respect to the case of *Thompson v. The Universal Salvage Company*, it may be observed, that it was not objected that the affidavits were insufficient, or probably the rule would have been discharged on that ground.

POLLOCK, C. B., concurred.

Rule discharged.

(a) 9 Exch. 149.

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Nov. 26.

COBBETT v. LUDLAM, Executor of J. OLDFIELD.

O., the defendant's testator, instituted a suit in Chancery for the administration of the estate and effects of C., the plaintiff's testator. An order was made by the Court of Chancery, that the plaintiff be restrained by injunction from interfering with the estate or effects of C. The plaintiff brought an action against the defendant for an alleged infringement by O. of C.'s copyright in certain books:—*Held*, first, that the action was in disobedience of the order of the Court of Chancery, since the damages, when recovered, would be assets of C. in the plaintiff's hands: Secondly, that under the 22d section of the Common Law Procedure Act, 1852, this Court had jurisdiction to stay proceedings in the action, although no writ of injunction had issued.

THIS was a rule calling on the defendant to shew cause why an order of *Martin*, B., staying all further proceedings in this action, should not be rescinded.

It appeared from the affidavits that the plaintiff was executor of his father W. Cobbett; and that in July, 1835, J. Oldfield instituted a suit in Chancery for the administration of the estate and effects of W. Cobbett. A receiver was appointed; and on the 13th of July, 1835, an interlocutory order was made by the Court of Chancery, that the plaintiff be restrained by injunction from interfering with the estate or effects of W. Cobbett. That injunction was continued by an order of the 1st of August, 1835, and a final order was made on the 16th of December, 1835, but no writ of injunction issued. Proceedings from time to time took place in the suit, which is still pending. On the 14th of July, 1853, J. Oldfield died, and the defendant became his executor. On the 3rd of April, 1855, the plaintiff brought an action against the defendant, in which he claimed 11,600*l.* as due to him as such executor for money received by the defendant's testator. On the 8th of May an order was made by the Court of Chancery restraining the proceedings in this action, and also restraining the plaintiff from proceeding in any other action against the defendant as executor of W. Oldfield. On the 9th of July, 1855, the plaintiff commenced the present action, in which he sued for an alleged infringement by the defendant of the copyright of certain books belonging to his testator, W. Cobbett. A summons was taken out to stay proceedings in that action; and *Martin*, B., before whom it was

heard, on production of the orders of the Court of Chancery of the 13th of July, 1835, 1st of August, 1835, and 16th of December, 1835, made an order accordingly. The plaintiff then obtained the present rule; against which

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Lush shewed cause (Nov. 17).—The order of the learned Judge was correct. The 226th section of the Common Law Procedure Act, 1852, enacts "That in case any action, suit, or proceeding in any Court of law or equity shall be commenced, sued, or prosecuted in disobedience of or contrary to any writ of injunction, rule, or order of either of the superior Courts of law or equity at Westminster, or of any Judge thereof, in any other Court than that by or in which such injunction may have been issued, or rule or order made, upon the production to any such other Court or Judge thereof of such writ of injunction, rule, or order, the said other Court in which such action, suit, or proceeding may be commenced, prosecuted, or taken, or any Judge thereof, shall stay all further proceedings contrary to any such injunction, rule, or order; and thenceforth all further and subsequent proceedings shall be utterly null and void to all intents and purposes," &c. This action is in direct violation of the orders of the Court of Chancery, by which the plaintiff is restrained from interfering with the estate of his testator. An action for the infringement of the testator's copyright is within the terms of those orders, for whatever damages are recovered will be assets in the hands of the plaintiff: 2 Wms. Exors. 1409. [*Parke*, B.—In moving for the rule the plaintiff contended that we had no power to interfere, since no writ of injunction had issued.] The case is within the language of the statute, for it is a disobedience of an "order of a superior Court of equity." [*Parke*, B.—The latter part of the 226th section omits the word "writ."] The obvious intention was that the enactment should extend to all prohibited proceedings. This being a remedial clause, the Court will put a

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liberal construction upon it. In practice a writ of injunction seldom issues, and proceedings are taken on the order. In Daniell's Chan. Prac., Vol. 2, p. 1547, 2nd ed., it is said, "that an injunction operates from the date of the order, and not from the sealing of the writ." Also, at p. 1548, it is said, that "In some cases a committal may be ordered, where neither the writ nor the minutes of the order have been served, nor any personal notice given; thus it was held by Lord *Hardwicke*, that, if the person was in court at the time the order for an injunction was pronounced, that alone would be sufficient notice (a); and if the party should remain in court until the order was about to be made, he cannot, by getting out of the hall at that instant, avoid its consequences" (b). [*Alderson*, B.—Will the Court of Chancery commit a person for the breach of an injunction where no writ of injunction has issued at the time of the application for the committal?] In *Ellerton v. Thirsk* (c) Lord *Eldon* is reported to have said, that a motion to commit for the breach of an injunction could not be made without producing the writ; but on that case being cited in *M'Neil v. Garratt* (d), Lord *Cottenham*, C., said, "It is the established rule of the Court, that a party who has notice of an order is bound by it from the time it is pronounced; and if he presumes to disobey it he is liable to the censure of the Court for so doing. But now it is said, that the Court cannot punish the party for disobedience till after the writ has issued, and Lord *Eldon's* authority is cited for that proposition. I cannot suppose that Lord *Eldon* ever laid down any such rule. The writ bears date when the order is passed. If therefore the proposition were correct, a party would have all the interval between the making and passing of the order, to commit the act which the injunction is intended to restrain." [*Alderson*, B.—In *M'Neil*

(a) *Anonymous*, 3 Atk. 567; 136.

Skip v. Harwood, 1d. 564.

(c) 1 J. & W. 376.

(b) *Hearn v. Tennant*, 14 Ves.

(d) 1 Cr. & Ph. 98.

v. *Garratt* the writ had actually issued at the time the application was made for the defendant's discharge, so that there was no ground for discharging him. It is like the case of an application for a habeas corpus to discharge a person in custody under a bad warrant of commitment, and where, at the time of his being brought before the Court, a good warrant is produced.] Under the clause in question the Court has authority to act wherever a party has notice of an order of a Court of equity restraining him from proceeding.

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Plaintiff in person. — According to the true construction of the 226th section of the Common Law Procedure Act, 1852, this Court has no jurisdiction to stay proceedings, unless a writ of injunction has been actually issued and served. The word "order" in that section has no reference to an order of a Court of equity. The term "writ of injunction" designates the process which is peculiar to the Court of Chancery; "rule" means a rule of a Court of common law; and "order" refers to the order of a Judge at Chambers. [*Parke, B.*—If there is any decretal order of the Court of Chancery, whether interlocutory or final, which by implication stays these proceedings, we are enabled to give effect to it by the enactment in question.]

The plaintiff having then suggested that no final decree containing any order in the nature of an injunction had in fact issued, the case stood over, in order to ascertain whether such an order had been made. On the 26th of November the plaintiff was again heard; when

POLLOCK, C. B., said—I am of opinion that we are enabled, by the 15 & 16 Vict. c. 76, s. 226, to stay proceedings in this action. Many years ago a suit was instituted in the Court of Chancery which in reality deprived the plaintiff of all control over the affairs of his testator; for

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that Court took upon itself the administration of the assets of the deceased. It is true that no final decree has been made in the suit; but there is an absolute order that the plaintiff shall not meddle with the estate or effects of his testator. He has now brought an action, in which he seeks to recover damages for an alleged infringement of the copyright of his testator's books; and if that action is well founded, there can be no difficulty in applying to the Court of Chancery for leave to proceed with it; and without that liberty the plaintiff is only incurring expenses, either on his own part or that of the estate, which he has no right to do. However, the question now is, what is the construction of the Act of Parliament—does it require that a writ of injunction should issue before we can interfere? In my opinion it certainly does not, and that it is only necessary that there should be an order of the Court staying proceedings.

PARKE, B.—I am of the same opinion. The Court granted the rule principally upon a doubt, whether, under the 226th section of the Common Law Procedure Act, 1852, they had jurisdiction to stay proceedings, unless a writ of injunction had actually issued. Upon consideration of that question, I am satisfied that, according to the true construction of the Act, the Court has power to interfere, not only where a writ of injunction has issued, but also where there is an *order* for an injunction. The next question is, whether the plaintiff has been restrained by an order of the Court of Chancery from bringing this action. Now, the effect of the final order of the 16th of December, 1835, is, that the Court prohibits him from meddling with the assets of his testator; and that prevents him from bringing any action which may interfere with the distribution of the assets. Therefore, in bringing this action, he is guilty of a disobedience of that order. The plaintiff sues as executor of his father, for the purpose of establishing

his right to a certain copyright; and if the plaintiff recovers, the damages must be distributed amongst the unpaid creditors of his father. This rule must therefore be discharged. If there be a good ground of action, the order of my Brother *Martin* does not prevent the plaintiff from applying to the Court of Chancery for permission to proceed; but without that permission, any step which he may now take will be null and void. I entertained no doubt about the point when it was first argued, but it was then suggested by the plaintiff that there was no final decree. It turns out, however, that the order for the injunction is still in force, and that impliedly prohibits the plaintiff from bringing this action.

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ALDERSON, B., and PLATT, B., concurred.

Rule discharged.

MICHAELMAS VACATION, 19 VICT.

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In the Matter of JOHN NATHANIEL MICKLETHWAIT, and
THE COMMISSIONERS OF INLAND REVENUE

A., by settlement on the marriage of his daughter with B., covenanted to pay them 500*l.* a year during their lives, provided that if B., by reason of the death of his brother without issue, should come into possession of certain estates, the covenant should cease, determine, and be void. In 1853, B.'s brother died without issue, and B. came into possession of the estates:—*Held*, on appeal, against the decision of the Commissioners of Inland Revenue, that, in assessing the duty chargeable under "The Succession Duty Act, 1853," B. was entitled, under the 38th section of that Act, to an allowance in respect of the loss of the annuity.

THIS was a petition against the decision of the Commissioners of Inland Revenue, under "The Succession Duty Act, 1853," (16 & 17 Vict. c. 51, s. 50). The petition stated, that, by indenture dated the 28th May, 1849, and made between Nathaniel Micklethwait of the first part, John Branthwayt Micklethwait of the second part, the petitioner of the third part, Charles Mills of the fourth part, Emily Mills of the fifth part, Francis Astley, &c. of the sixth part, and Edward Mills and Frederick Micklethwait of the seventh part, being a settlement made upon the marriage, then intended and shortly afterwards solemnised, between the petitioner and Emily Mills, the said Charles Mills, on behalf of himself, his heirs, executors, and administrators, covenanted to pay to the said Edward Mills and Frederick Micklethwait an annual sum of 500*l.* during the lives of the petitioner and the said Emily Mills, and the life of the survivor, payable half yearly, &c.; and it was by the said indenture declared, that the said Edward Mills and Frederick Micklethwait, their executors, administrators, and assigns, should hold the said annuity of 500*l.* upon trust, to pay the same to the petitioner during his life, and after his death to the said Emily Mills, during her life. And it was by the said indenture provided, that if the petitioner should, by reason of the death without issue male of

section of that Act, to an allowance in respect of the loss of the annuity.

Sir Sotherton Micklethwait, come into possession of certain estates, therein mentioned to have been devised to the petitioner and his assigns, for his life, by the will of the said John Micklethwait, deceased, and which will bears date the 24th October, 1822, then the said covenant thereinbefore contained on the part of the said Charles Mills, his heirs, &c., for the payment of the said annuity or yearly sum of 500*l.*, should absolutely cease, determine, and be void.

The said Sir Sotherton Micklethwait died on the 3rd September, 1853, without issue male. Upon such death, the petitioner came into possession of the estates, in the said proviso mentioned to have been devised to him and his assigns for his life by the said will bearing date the 24th October, 1822, and thereupon he was deprived of the said annuity so payable to him as aforesaid.

The petitioner made a return to the Commissioners of all the succession on real property accruing to him upon such death as aforesaid, and in such return claimed to have an allowance made to him, under the provisions of "The Succession Duty Act, 1853," in respect of the value of the said annuity of which he had been so deprived as aforesaid. The Commissioners have, in the assessment made by them in respect of such succession, refused to make such allowance as aforesaid.

Prayer—That the assessment of the Commissioners may be rescinded as far as the same omits to make to the petitioner an allowance in pursuance of the provision of "The Succession Duty Act, 1853," in respect of the value of the said annuity of 500*l.* per annum of which he has been so deprived as aforesaid; and that such allowance as aforesaid may be ordered to be made to the petitioner.

Bovill and Thring for the petitioner (a).—The petitioner

(a) *Pigott* claimed the right to begin, on the ground that he appeared in support of the assessment of the Commissioners; but the Court held that the petitioner was entitled to begin.

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is entitled to an allowance in respect of the annuity which he has lost. It is conceded, that the property which the petitioner took under the will of the 24th October, 1822, conferred on him a "succession" within the meaning of the 16 & 17 Vict. c. 51, s. 2, and that it is subject to duty under the 10th section; but throughout the Act care has been taken to prevent persons from being charged with duty, except on the value of the property which they have obtained. The principle has been to render the tax co-extensive with the actual benefit derived from the succession. Thus the 14th section provides, that where the interest of any successor in personal property shall, before he becomes entitled thereto in possession, have passed by reason of death to any other successor, only one duty shall be paid, and shall be due from the successor who first becomes entitled in possession. By the 20th section, the duty is to be paid when the successor becomes entitled in possession to his succession, and in the case of outstanding interests on the determination thereof. The 28th section allows a deduction for fines, &c., on charges incident to the tenure of copyhold or real property. [*Alderson, B.*—That shews that the word "value" means "net value."] By the 34th section an allowance is to be made in respect of monies which the successor may, previously to his possession, have laid out in repairs or improvement of real property. The 35th section enables the successor to claim a return of duty in the event of a contingent incumbrance taking effect as an actual burden. The 37th section provides, that where the successor shall not have obtained the whole of his succession at the time of the duty becoming payable, he shall only be chargeable on the value of the property or benefit obtained by him; and it also provides for refunding the duty where it has been paid in respect of property which the successor has been unable to recover, or from which he has been evicted. Then by the 38th section, "Where any successor, upon taking a succession, shall be bound to

relinquish or be deprived of any other property, the Commissioners shall, upon the computation of the assessable value of his succession, make such allowance as to him may be just in respect of the value of such property." The present case falls within that enactment. If the petitioner is not entitled to an allowance in respect of the loss of his annuity, there will be a double tax, for the settlor became a successor within the meaning of the 5th section, and by the 12th section he is chargeable with duty in respect of his succession.

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Pigott for the Crown.—This is a mere personal covenant by the settlor to pay the petitioner 500*l.* a year until he shall come into possession of other property; and when the annuity ceased, that was not a relinquishment or deprivation of property within the meaning of the 38th section. The petitioner lost the annuity, not because he had come into possession of the other property, but by reason of the covenant having ceased. [*Parke, B.*—He is deprived of "other property," if this covenant to pay 500*l.* a year is "property." *Alderson, B.*—The interpretation clause (section 1) declares that the term "personal property" shall include "money payable under any engagement." Then the 38th section may be thus read—"Where any successor upon taking a succession shall be bound to relinquish or be deprived of any money payable under any engagement," &c. Here the petitioner upon taking a succession is deprived of money payable under an engagement, viz. 500*l.* a year, payable under a covenant contained in his marriage settlement.] That means money payable under a subsisting engagement: here the covenant is at an end. This annuity was merely a provision for the petitioner until he should acquire his succession, and therefore, when he obtained it, he cannot be said to have been deprived of property within the meaning of the Act. [*Parke, B.*—He has lost the benefit of a covenant to pay him 500*l.* a year. If

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the words had been, that, on the event taking place, he "shall give up" the 500*l.* a year, he would have been "bound to relinquish" it; but as the language of the covenant is, that the annuity "shall cease, determine, and be void," he is "deprived" of it.] It was never intended that a successor should only be taxed upon the balance of benefit which he might derive from his succession. The object of the legislature was to tax all property acquired by succession. The settlor would not be chargeable in respect of this annuity, for it has ceased to exist. What allowance could be made in respect of a covenant which is at an end?

PARKE, B.—I am of opinion that our decision ought to be in favour of the petitioner. It is a well-established rule, that the subject is not to be taxed without clear words for that purpose; and also, that every Act of Parliament must be read according to the natural construction of its words. Now the 38th section of this Act provides, that "where any successor upon taking a succession shall be bound to relinquish or be deprived of any other property, the Commissioners shall, upon the computation of the assessable value of his succession, make such an allowance to him as may be just in respect of the value of such property." The interpretation clause enables us to understand what is meant in this case by the word "property." It is not goods and chattels, it is not a lease for a term of years, but it is "money payable under any engagement." Is it possible, in ordinary parlance, to say that at the time when the petitioner succeeded to Sir Sotherton Micklethwait's property, he did not lose 500*l.* a year, which was payable under that engagement? It is true that the engagement ceased, but he has lost the benefit of a covenant to pay 500*l.* a year. Then in the absence of any further words to express the meaning of the term "property," this must be considered to be property. He has lost that, and got an estate of much more value; but then the value of what the succession

brings to him is the value of that property minus 500*l.* a year. If the legislature meant that the successor should not be exempt from this claim unless the property relinquished was also property to be taxed, and upon which the succession duty should be paid by another, they would have said so, but they certainly have not.

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ALDERSON, B.—I am of the same opinion. Reading the 38th section together with the interpretation clause, the meaning is perfectly plain. The 38th section says, “that when any successor, upon taking a succession,” that is, “any property chargeable with duty under this Act, shall be bound to relinquish or be deprived of any other property,” that is, ‘shall be bound to relinquish or be deprived of money payable under an engagement,’ “the Commissioners shall, upon the computation of the assessable value of his succession, make such an allowance to him as may be just in respect of the value of such property.” If therefore the 500*l.* a year annuity which the petitioner loses was upon his life only, and the property to which he succeeds is property in fee, it may be, that, in the computation of the value of it, those circumstances must be taken into consideration; but upon that point it is unnecessary to give any opinion.

PLATT, B., concurred.

Bovill applied for the costs of the appeal, and referred to the 50th section of the Succession Duty Act as giving the Court a discretion as to costs.

PER CURIAM.—We think that the petitioner is entitled to costs.

Rule accordingly.

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IN Re WRIGHT and THE COMMISSIONERS OF INLAND
REVENUE.

A conveyance,
executed in
England upon
a sale of land
in Australia,
requires an ad
valorem
stamp.

THIS was a case stated by the Commissioners of Inland Revenue, pursuant to the 13 & 14 Vict. c. 97, s. 15, and 16 & 17 Vict. c. 59, s. 13, to enable S. Wright to appeal to this Court against the determination of the Commissioners as to the stamp duty chargeable on the deed hereinafter set out.

The deed is an indenture, dated the 6th of January, 1855, and made between E. Woodhouse, of Wilton Park, in the parish of North Walsham, in the county of Norfolk, and Diana, his wife, of the one part; and S. Wright, of Lockleys, in the province of South Australia, of the other part; whereby, after reciting a grant made to E. Woodhouse, his heirs and assigns, of certain land and hereditaments, situate in the said province; and also reciting that the said S. Wright had contracted with the said E. Woodhouse for the purchase of the said land and hereditaments for the sum of 800*l.*; and that the said Diana Woodhouse had consented to release her dower out of the same; it was witnessed, that, in consideration of 800*l.* to E. Woodhouse paid by S. Wright, E. Woodhouse did grant, bargain, sell and release, and Diana, the wife of E. Woodhouse, in order to bar her dower, did release unto S. Wright and his heirs, all that section of land situated in the province of South Australia, containing eighty acres, numbered 162 in the provincial survey, &c., together with the appurtenances, &c.; To hold the same unto S. Wright and his heirs, to the use of S. Wright his heirs and assigns, for ever.

The said S. Wright presented to the Commissioners of Inland Revenue the said deed unstamped, and desired to have their opinion as to the stamp duty with which the

same was chargeable; and the Commissioners being of opinion that the deed was chargeable, under the 13 & 14 Vict. c. 97, with the ad valorem duty of 4*l.* as a conveyance upon the sale of property for 800*l.*, they assessed and charged the sum of 4*l.* as such duty.

The question for the opinion of the Court is, whether the said deed is chargeable with any, and what, stamp duty.

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Lush for the appellant.—The deed in question is not liable to any stamp duty. The Stamp Acts relate solely to land in Great Britain or Ireland, and do not apply to conveyances in this country of land abroad. The 55 Geo. 3, c. 184, s. 2, enacts, "That there shall be raised, levied, and paid, &c., *in and throughout the whole of Great Britain*, for and in respect of the several instruments," &c., "mentioned in the schedule, the duties there specified." Under the title, "Bargain and Sale," Sched. Pt. 1, the duties are, in express terms, confined to lands or hereditaments *in England*. Under the head "Conveyance," Sched. Pt. 1, an ad valorem duty is imposed upon every conveyance, "upon the sale of any lands," &c., "in respect of the principal or only deed," &c. Then, in a subsequent clause, which defines the meaning of the terms "principal deed," mention is made of conveyances of "lands and hereditaments in England." Under the head "Mortgage," Sched. Pt. 1, no reference is made to the locality of the land, because all the provisions contemplate dealing with property in this country. The 13 & 14 Vict. c. 97, only altered the amount of duty chargeable. Reliance will be placed on the 1 & 2 Geo. 4, c. 55; but that statute was never intended to apply to conveyances in this country of land abroad. Its object was to remove doubts as to the duty payable where a different rate is chargeable under the Acts relating to Great Britain and Ireland. It provides that every deed which relates wholly to property in Ireland shall be chargeable with the duty imposed by the

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Irish Acts; that if the deed relates to property in Great Britain, "*or elsewhere than in Ireland*," it shall be chargeable with the duty imposed by the English Acts; and that if it relates to property in Ireland, and also to property in Great Britain, "*or elsewhere than in Ireland*," it shall be chargeable with the English duty. And there is a further provision, that those duties only shall be chargeable, whether the deed is executed within the United Kingdom or not. [*Parke, B.*—The title "Conveyance," Sched. Pt. 1, has the words, "upon the sale of any lands," &c., "or of any right, title, interest, or claim in, to, out of, or upon any lands," &c. Now, this deed operates to bar the wife's dower in the land.] If this deed is subject to stamp duty, it would follow that every conveyance in this country of land in France is also liable to stamp duty.

Pigott appeared on behalf of the Crown, but was not called upon to argue.

PARKE, B.—I cannot find any words in the 55 Geo. 3, c. 184, which exempt this deed from duty. That Act imposes an ad valorem duty on every conveyance upon the sale of land, provided that the deed is executed in this country.

ALDERSON, B.—We cannot restrain the general words of the Act.

PLATT, B., concurred.

Judgment for the Crown.

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In Re **ATTENBOROUGH** and **THE COMMISSIONERS OF INLAND REVENUE.**

Nov. 30.

THIS was a case stated by the Commissioners of Inland Revenue, pursuant to the 13 & 14 Vict. c. 97, to enable R. Attenborough to appeal to this Court against the determination of the Commissioners as to the stamp duty chargeable on the following instrument:

"11, Greek-street, Soho.

"I have this day deposited with Mr. Robert Attenborough the following goods, viz. tea and coffee set, waiter, milk-pot, &c., to be held by him as a security for the payment of the sum of 160*l.*, this day lent by him to me, together with interest thereon from the date hereof, after the rate of fifteen per cent. per annum till payment: and should such sum of 160*l.* not be paid by me to the said Robert Attenborough by the 25th day of March next, I do hereby authorise and empower the said Robert Attenborough, his executors, &c., to sell or dispose of the said articles, or any of them, either by public sale or private contract, and out of the proceeds thereof to pay the expenses of and incidental to such sale, and retain the said sum of 160*l.* and interest thereon after the rate aforesaid until the time of such retainer, or so much or such part thereof respectively as shall remain unpaid. Dated this 28th day of November, 1854.

"H. RADCLIFFE."

The following instrument was held not to require a mortgage stamp:—"I have this day deposited with A. the following goods, viz. tea and coffee set, &c., to be held by him as a security for the payment of 160*l.*, this day lent to me, together with interest; and should such sum of 160*l.* not be paid by me to A., by the 25th of March next, I hereby authorise and empower him to sell and dispose of the said articles, and out of the proceeds thereof to pay the expenses of the sale, and retain the said sum of 160*l.* and interest thereon."

The said Robert Attenborough, by his attorney, presented to the Commissioners of Inland Revenue the said instrument unstamped, and desired to have their opinion as to the stamp duty with which the same was chargeable; and the Commissioners being of opinion that the instrument was chargeable under the 13 & 14 Vict. c. 97, with the ad

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valorem duty of 5s. as a mortgage of personal property made as a security for the payment of 160*l.* advanced and lent at that time, they assessed and charged the said sum of 5s. as such duty.

The question for the opinion of the Court is, whether the said instrument is liable to ad valorem mortgage duty, and if not, to what other stamp duty the same is liable.

Phipson for the appellant.—The instrument in question is not a mortgage, but a mere memorandum of the deposit of goods, with a superadded power of sale in a certain event. *Harris v. Birch* (a) is an authority in point. There a firm, desiring an advance of money, wrote to the proposed lender, stating that, in consideration of his accepting their draft, they handed to him therewith the bill of lading and policy of insurance for wines expected to arrive, and they engaged to land and warehouse the wines to be held at his disposal; and that document was held not to require a mortgage stamp. This case is not distinguishable from *Harris v. Birch*, except that there the agreement contained no power of sale. That circumstance, however, is immaterial: the question depends on the character of the transaction,—whether it places the depository in the position of a mortgagee or a pledgee. The distinction between a mortgage and a pledge is well established. In the case of a mortgage, the absolute property in the goods is transferred to the mortgagee, defeasible upon repayment of the money advanced; but a pledge only gives to the pledgee a special property, subject to which the pawnor still retains his right of property: *Franklin v. Neate* (b). This is the case of a mere pledge.

Pigott for the Crown.—This instrument transfers to the lender the property in the goods in trust to sell them in

(a) 9 M. & W. 591.

(b) 13 M. & W. 481.

default of payment, and is therefore a mortgage. The 13 & 14 Vict. c. 97, Sched. tit. "Mortgage," has the words, "conditional sale by way of mortgage." In *Horsfall v. Hey* (a), a memorandum that T. *has sold* to G. all the goods, stock in trade, and *fixtures*, in a certain shop," was held to require an ad valorem stamp as a conveyance. [Parke, B.—If the words had been, "I have this day conveyed," &c. or "made over," &c., the case might have been different, but there are no words capable of passing more than a special property in the goods.] In *Caldwell v. Dawson* (b) an assignment of a policy of assurance as a security for a debt, with a proviso for redemption on payment, was held to require a mortgage stamp.

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PARKE, B.—The case of *Harris v. Birch* decided that a deposit of goods, or any document relating to goods, as a bill of lading or a dock warrant, is not a mortgage within the 55 Geo. 3, c. 185. That decision is confirmed by the principle laid down in the case of *Franklin v. Neate*. It is true that this case goes somewhat further than *Harris v. Birch*, since the instrument contains a power of sale; but that does not render it a conveyance by way of mortgage.

ALDERSON, B., and PLATT, B., concurred.

Judgment for the appellant.

(a) 2 Exch. 778.

(b) 5 Exch. 1.

1855.

Dec. 1. In the Matter of an Arbitration between JEREMIAH BYLES
and THE IPSWICH DOCK COMMISSIONERS.

An arbitrator appointed under the 68th section of the "Lands Clauses Consolidation Act, 1854," has no jurisdiction to adjudicate upon any collateral matter affecting the claim to compensation, but only to determine the amount of damage.

THIS was a rule, calling on the Ipswich Dock Commissioners to shew cause why an award made in this case should not be set aside, or referred back to the arbitrator.

It appeared from the affidavits, that the commissioners were acting in execution of the 45 Geo. 3, c. 101, and other Acts, for improving the port of Ipswich. By the 1 Vict. c. lxxiv. s. 17, they were empowered to make on a part of the river Orwell, described on a plan, a navigable dock, and also a new cut, channel, or river, quays, &c. The plan included certain property belonging to Nathaniel Byles, the father of Jeremiah Byles.

When the commissioners were about to make the new cut, an agreement, dated the 16th of July, 1841, was entered into between one of the commissioners on behalf of all, and Nathaniel Byles. By this agreement, after reciting "that, in order to avoid the injury which would have been occasioned to the property of N. Byles, lying on the north side of the river Orwell, in the parish, &c., in case the upper embankment of the new dock had been constructed, as it was designed, in the exact original line laid down in the plan and specification of the works to be done under the authority of the said Act; and that, in order to avoid all claim to compensation for such injury, the commissioners had agreed to construct the upper embankment of the dock on the line and in form and manner delineated and described on a plan thereunto annexed;" N. Byles agreed to sell to the commissioners a triangular-shaped piece of land (therein described) on the south side of the river Orwell; and the commissioners agreed, as soon as they were put in possession of the said piece of land, to

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pay 500*l.* to N. Byles; and, in order to secure to him an equivalent in land for the triangular piece, the commissioners agreed to procure for him a piece of land contiguous to it. They also agreed that they would, in a good and substantial manner, and at their own expense, erect a new wall or quay-front along the whole line of frontage of N. Byles' premises (as described in the agreement). This agreement was performed, and the wall built.

On the 17th of June, 1852, the 15 Vict. c. cxvi. passed, to consolidate and amend the Acts relating to the Ipswich Dock, by the 13th section of which "The Lands Clauses Consolidation Act, 1845," was incorporated with that Act. In December, 1852, Jeremiah Byles complained to the commissioners that the foundation of the wall and quay was undermined by the water of the river Orwell, and that the damage was occasioned by the execution of their works.

On the 12th of May, 1853, J. Byles served the commissioners with a notice, under the 68th section of the Lands Clauses Consolidation Act, 1845, claiming compensation for the damage, and stating his desire to have it settled by arbitration. The commissioners having declined to appoint an arbitrator, on the 10th of June, 1853, J. Byles appointed Mr. Beardmore the arbitrator for both parties.

On the 27th of December, 1853, Mr. Beardmore awarded "that the sum of 380*l.* should be paid to J. Byles by the commissioners, as and for full compensation to J. Byles for the damage sustained by him by reason of certain works of the commissioners having damaged, undermined, injured, and injuriously affected a certain quay, messuage, &c., the property of J. Byles;" and the arbitrator also adjudged that the costs of the reference should be borne by the commissioners.

On the 2nd of June, 1854, a rule was obtained, on behalf of J. Byles, calling on the commissioners to shew cause why they should not pay the sums awarded. Cause was shewn on the 14th of June, when it was ordered, by con-

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sent, that the rule should be referred to *Alderson*, B., and *Martin*, B., at Chambers, to direct what were the facts and matter in law in dispute to be determined, and how they should be determined. By another rule of Court, made on the 1st of December, 1854, made on reading an order of *Alderson*, B., and *Martin*, B., and by consent, it was ordered that the matter of the said rules should be referred to J. Worlledge, Esq., to determine the following questions of fact:—

1. Whether the property of J. Byles has been injuriously affected by the execution of the works of the commissioners, and for which they have not already made satisfaction?

2. Whether such injury (if any) arose from works executed under or in pursuance of the agreement dated the 16th of July, 1841?

3. Whether the wall was sufficient when made with a view to the future?

4. Whether any and what portion of the damage (if any) arose before the 17th of June, 1852?

5. In respect of what works, and when executed, did the damage (if any) arise?

And that it be referred to the said arbitrator to determine the question of law arising upon the said rules; and that, if the award of Mr. Beardmore be held by the arbitrator to be invalid, he should determine whether J. Byles is nevertheless entitled to compensation from the commissioners.

On the 1st of May, 1855, Mr. Worlledge made his award, whereby (after reciting the award of Mr. Beardmore, the rules of Court, &c.,) he recited, that, “at the hearing of the reference, the counsel for the commissioners contended before him, that the award of Mr. Beardmore was invalid, upon the ground (amongst others), that, if the arbitrator found that the property of J. Byles had not been in fact injuriously affected by the execution of any works of the commissioners, or that if it had, that the commissioners

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had made satisfaction for the same; Mr. Beardmore had no jurisdiction." The arbitrator then proceeded to award as follows:—

"First, with respect to the five questions of fact, I award,

"1. That the property of J. Byles has been injuriously affected by the execution of the works of the commissioners, and for which they have not already made satisfaction, as hereinafter explained in my award and finding on the fifth question of fact.

"2. That such injury arose solely from works executed under the said agreement, dated the 16th of July, 1841, as hereinafter explained in my award and finding on the fifth question of fact.

"3. That the wall when made was not sufficient with a view to the future.

"4. That part of the damage arose before the 17th of June, 1852, and part since that day, as hereinafter explained in my award and finding on the fifth question of fact; but the cause of such damage arose and was complete on or before January, 1842, though the damage was not known to J. Byles until November, 1852.

"5. That the wall was built under the agreement, dated the 16th of July, 1841, by which the then Ipswich Dock Commissioners agreed that they would build the same in a good and substantial manner; but the wall (which was begun in November, 1841, and finished in January, 1842) was not built in a good and substantial manner, as by the agreement it ought to have been, in this, that the foundation thereof was not carried to sufficient depth into the bed of the new cut of the river Orwell, upon which the wall abuts, nor was the foundation of the wall constructed of proper materials, and in consequence thereof the lower part of the wall has in some places bulged considerably, and the water of the river Orwell has from time to time penetrated under or through the foundation of the wall and up behind the wall, and has thereby loosened and un-

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settled the soil of J. Byles which is supported by the wall, and thereby the property of J. Byles has been injured. That the bulging above mentioned took place after the wall was finished, and long before the 17th of June, 1852; but the water of the river Orwell has penetrated under and through the foundation of the wall, and up behind the same, and loosened and unsettled the soil, both before and since the 17th of June, 1852.

"And I hereby award and find, that, except by the original bad construction of the wall as above explained, neither any former, nor the present, Ipswich Dock Commissioners have, by the execution of any of the works, at any time, either injured or injuriously affected, or in any way contributed to the injury of the property of the said J. Byles.

"Secondly, as to the questions of law arising upon the said rules—Upon the facts as above found by me, I award and decide that the award of Mr. Beardmore was and is invalid, upon the ground, that the property of J. Byles has not been injuriously affected by any works of the commissioners, except by the original bad construction of the wall as above mentioned; but not upon the other grounds, or either of them, upon which the counsel for the Ipswich Dock Commissioners contended that such award was invalid."

"Thirdly, as to J. Byles' right to compensation—Although I have decided the award of Mr. Beardmore to be invalid, I award and decide that J. Byles was not in November, 1852, nor is he now, entitled to compensation from the Ipswich Dock Commissioners, his right to the same being, in my judgment, barred by the Statute of Limitations."

The present rule was obtained on the ground (amongst others): first, that the arbitrator only found the award of Mr. Beardmore to be invalid on the ground that J. Byles had not sustained any damage by the works of the com-

missioners, save as explained in his finding on the fifth question of fact, and by the original bad construction of the wall; and that the said finding and reference to the original bad construction of the wall shew damage such as, in point of law, to sustain the award of Mr. Beardmore; and the arbitrator ought, consistently with such finding, to have adjudged the award valid. Secondly, that it appears on the face of the award, that J. Byles is entitled to compensation, notwithstanding the Statute of Limitations.

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Bramwell and *D. Power* shewed cause (Nov. 22.)—First, the arbitrator has rightly decided that the award of Mr. Beardmore is invalid. If no reason had been given, the decision of the arbitrator could not have been questioned; his statement, however, does not affect the validity of the award, for the arbitrator proceeds to explain that the damage arose, not from the execution of the works under the Act, but from the improper construction of the wall under the agreement. That is a matter which Mr. Beardmore had no jurisdiction to inquire into. Under the 68th section of "The Lands Clauses Consolidation Act, 1854," the only matter which could be submitted to the arbitrator was the amount of compensation; and therefore he had no power to determine whether the lands were injuriously affected by the execution of the works of the company: *Regina v. London & North Western Railway Company* (a), *In Re Bradby and The Local Board of Health for Southampton* (b). The existence of some damage was essential to give the arbitrator jurisdiction. [*Parke, B.*, referred to *The London & North Western Railway Company v. Smith* (c) and *The East & West India Dock & Birmingham Junction v. Gattke* (d).]

(a) 3 E. & B. 443.

(c) 1 Mac. & G. 216.

(b) 4 E. & B. 1014.

(d) 3 Mac. & G. 155.

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Secondly, the claimant has in fact been compensated for the entire damage. By the 77th section of the 1 Vict. c. lxxiv., he had a right to compensation for the damages to be sustained by making or completing the said dock, quay, &c.; and the agreement of the 16th of July, 1841, was in substitution of his rights under that Act. It expressly recites that it was made "in order to avoid all claim to compensation for such injury." The object of the parties was, that the claimant should be compensated once for all damage consequent on the making of the new cut. If the performance of that agreement were not in lieu of all compensation, there would be some damage uncompensated, even though the wall had been properly built. Reading the agreement together with the 77th section, it is clear that the former provided for prospective damage.

Lush and H. Mills in support of the rule.—First, the 20th section of the 1 Vict. c. lxxiv., provides that the commissioners shall not extend their works beyond the line or boundary described in the maps or plans, without the consent of the owner of the land required. Therefore, in this case, the commissioners had no power to take Mr. Byles' land without his consent. That consent was embodied in the agreement of the 16th of July, 1841. When the damage became apparent, he claimed compensation; and that being refused, he gave notice of his desire to have the claim settled by arbitration under the 68th section of the Lands Clauses Consolidation Act, 1845. Under that section the arbitrator had jurisdiction to determine whether any damage had been sustained, and, if any, the amount of compensation: *Regina v. Lancaster & Preston Junction Railway Company* (a). Under the 68th section, the inquiry is wider than under the 18th and 25th sections, which relate to the purchase of land. That being so, the arbi-

(a) 6 Q. B. 759.

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trator has decided that the award of Mr. Beardmore is bad on insufficient grounds, and therefore the Court ought to hold it valid.—Secondly, upon the facts found by the arbitrator, Mr. Byles is entitled to compensation. Assuming that the damage arose from the defective construction of the wall under the agreement, still it was a damage occasioned by the execution of the works of the commissioners. They had no power to carry on any works except under the authority of their Acts. Therefore the claimant has a two-fold right, viz. a right of action for the breach of the agreement in not properly building the wall, but which is now barred by the Statute of Limitations; and a right to compensation under the 1 Vict. c. lxxiv. s. 77, for the injury occasioned by the execution of the works. He did not lose his remedy under the Act by acquiring a right under the agreement. Suppose the wall had never been built, and in consequence the claimant's land was overflowed with water, he might have maintained an action for the breach of contract in not building the wall, but still the flooding of his land would be an injury arising from the works of the commissioners, for which he would be entitled to compensation. This right exists, notwithstanding the wall when built was vested in the claimant, because its defective construction caused a continuing damage. It was never intended that the performance of the agreement should be a compensation for the present and all future damage. In *The Lancashire & Yorkshire Railway Company v. Evans* (a), it was held that a landholder who had received, under an arbitration, compensation for the land and "in respect of damages which might be sustained by reason of making a railway," was not precluded from insisting on a further compensation for future unforeseen damages subsequently sustained.

The judgment of the Court was now delivered by

(a) 15 Beav. 322.

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PARKE, B.—This case comes before us on an application to set aside an award of Mr. Worlledge, or refer it back to him.

The award was made upon a special order of reference, which is set out particularly in the recital thereto, and the award is made in such a form as to enable the parties to take the opinion of the Court upon its validity. [His Lordship read the award.] The objections relied upon in argument were mainly two, first, that though the arbitrator had decided that the award of Mr. Beardmore was bad, he had decided upon a ground which was untenable, and, being set out in the award itself, for the purpose of submitting it to the consideration of the Court, that we ought to decide that the award was valid; secondly, that the arbitrator was wrong in adjudicating, upon the facts stated, that the complainant Mr. Byles was not entitled to compensation from the commissioners, and that although Mr. Byles might have had a remedy for the breach of the agreement, yet as that remedy was barred by the Statute of Limitations, he was still entitled to compensation under the provisions of the Ipswich Dock Acts. We think these objections ought not to prevail, and that the award is in all respects right.

As to the first objection, the arbitrator, having decided that Mr. Beardmore's award was invalid, assigns as the sole reason and ground for that decision that the property of Mr. Byles had not been injuriously affected by any works of the company (except by the original bad construction of the wall as before mentioned); and in the prior part he explains that Mr. Byles's quay and property had been injuriously affected by the execution of the works of the commissioners, but that such injury arose solely from works executed under, but not in conformity with, an agreement dated the 15th of July, 1851, by which the commissioners agreed that they would build a wall in front of Mr. Byles's property and forming the front of the quay towards the

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river, in a good and substantial manner; that the wall was not so constructed, not being to a sufficient depth under the bed of the river, nor the foundations made of proper materials, whereby the water of the river penetrated through and under the foundations, and loosened and unsettled the soil of Mr. Byles's property: the arbitrator in effect finding, that if the wall had been properly built, and according to the agreement, no damage from the works of the commissioners would have occurred; and therefore that the damage actually done was not by reason of the executing the powers of the Acts.

Now we think it perfectly clear that Mr. Beardmore had no power to determine this question. The question alone of the amount of compensation under the 68th section of the Lands Clauses Consolidation Act, had been referred by Mr. Byles, and constructively by the commissioners, from their omission to appoint another arbitrator under the 25th section. He had jurisdiction to determine the amount of the damage done to Mr. Byles's quay and lands by the execution of the works by the commissioners in the execution of the powers given by the Acts, but not the jurisdiction to decide whether the commissioners were excused from the obligation to pay him by any collateral matter. For instance, if the complainant had executed a deed, which it was contended operated as a release to the commissioners; the power to determine that question was wholly out of the limits of the authority delegated to Mr. Beardmore; and the matter now insisted upon as a defence against this claim is in truth equally beyond his jurisdiction.

The facts relating to this part of the case are undisputed and fully explained by the affidavits. On the 16th of July, in the year 1841, when the commissioners were about to make a new cut, an agreement was made between the then Mr. Byles and one of the commissioners on behalf of all, that, in order to avoid the injury to the property of the then Mr. Byles on the north side of the river Orwell, in

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case the embankment had been constructed in the exact line of the parliamentary plan and specification, and to avoid all claims for such injury, the commissioners agreed to construct the embankment in a different line. The then Mr. Byles agreed to sell to the commissioners a triangular piece on the south side of the river, and the commissioners agreed to purchase a piece of land contiguous, and cause it to be conveyed to Mr. Byles. They also agreed to give him 500*l.* when put in possession of the triangular piece; and further, that they would at their own expense, in a good and substantial manner, erect a new wall or quay front along the whole line of frontage of the triangular piece and adjoining property. The injury to this frontage is the subject of the claim for compensation.

The arbitrator finds that it was solely from the nonperformance of this agreement, not from the making or deepening of the cut, that the damage to the present Mr. Byles's property happened; and whether that agreement was broken or not, or whether that was the true cause of Mr. Byles's quay being damaged, were questions over which Mr. Beardmore could have no jurisdiction, and the affidavits state expressly that it was never submitted to him.

This agreement puts the parties very much in the same situation as if, instead of agreeing to build the wall, they had given to the then Mr. Byles a sum of money, he agreeing to build the wall himself. If he did not build it as deeply and substantially as he ought to have done, he would be the cause of his own loss; if he had employed a builder, his remedy would have been against him; at present his remedy is on the contract with the commissioners, which could not now be enforced if the commissioners plead the Statute of Limitations, but the damage by their breach of the contract is entirely collateral to the damage done by the exercise of the powers of the Act in making a cut. The question arising on this contract could not possibly have been decided by Mr. Beardmore, under the reference of the

amount of damage to him. Therefore the arbitrator was right in his opinion, that his award is invalid as to the decision of this question.

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The next point is, whether the arbitrator was right in the decision of the question itself in point of law, for his decision in point of fact cannot be questioned. We think, for the reason already stated, that, if the injury would not have occurred at all if the wall had been properly built, the arbitrator was quite right in holding that the exercise of the powers of the Act did not injuriously affect the plaintiff's property so as to make the defendants liable to pay any compensation.

One more matter remains to be noticed. Mr. *Mills* contended, that this making of the wall was itself a work under this Act, and therefore that the commissioners were responsible for the improper construction of that work. But it is quite clear that this is a private wall of Mr. Byles's, not a public work vested in the commissioners. The rule must be discharged.

Rule discharged.

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ROBINSON v. COTTERELL.
HALL and Others v. COATES.

The form of indorsement prescribed by the Summary Procedure on Bills of Exchange Act, 18 & 19 Vict. c. 67, may be altered, by inserting a claim for costs, and the blank before "days" may be filled up with "four."

An application to set aside a writ of summons issued under that Act for irregularity, is not too late if made within the time limited for obtaining an order to appear.

IN the first of the above cases, the defendant was served with a writ in the form prescribed by Schedule (A.) of the Summary Procedure on Bills of Exchange Act, 18 & 19 Vict. c. 67. The indorsement on the writ (after stating the name and address of the attorney by whom it was issued) was as follows:—

"The plaintiff claims 10*l.* 18*s.* 3*d.* for debt, and 2*l.* 2*s.* 6*d.* for costs, and interest due to him as indorsee of a bill of exchange, of which the following is a copy. (It then set out the bill.) And if the amount thereof be paid to the plaintiff within four days from the service hereof, further proceedings will be stayed."

Cleasby moved (Nov. 17) to set aside the copy and service of the writ for irregularity.—The 18 & 19 Vict. c. 67, s. 1, enacts, that "all actions upon bills of exchange or promissory notes commenced within six months after the same shall have become due and payable, may be by writ of summons in the special form contained in schedule A. to this Act annexed, and *indorsed as therein mentioned*," &c. The indorsement in the schedule, which is incorporated with the Act, is as follows: "The plaintiff claims [— pounds principal and interest] or — pounds, balance of principal and interest due to him as the payee [*or indorsee*] of a bill of exchange or promissory note, of which the following is a copy. [*Here copy bill of exchange or promissory note, and all indorsements upon it.*] And if the amount *thereof* be paid to the plaintiff or his attorney within — days from the service hereof, further proceedings will be stayed." Therefore, the legislature having prescribed a par-

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ticular form of writ, if that enactment had stood alone, this writ would have been clearly irregular. But it is sought to justify the indorsement by reference to the 7th section, which enacts, that "the provisions of the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1854, and all rules made under or by virtue of either of the said Acts, shall, so far as the same are or may be applicable, extend and apply to all proceedings to be had or taken under this Act." The 8th section of the Common Law Procedure Act, 1852, enacts, that, "upon the writ and copy of any writ served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ, copy, and service, and attendance to receive debt and costs; and it shall be further stated, that, upon payment thereof within four days to the plaintiff or his attorney, further proceedings will be stayed; which indorsement shall be written or printed in the following form, or to the like effect: 'The plaintiff claims £—— for debt, and £—— for costs; and if the amount thereof be paid to the plaintiff or to his attorney within four days from the service hereof, further proceedings will be stayed, &c.'" But that provision cannot apply to writs issued under the 18 & 19 Vict. c. 67, which prescribes a different form of writ. [*Alderson*, B.—The 7th section of the 18 & 19 Vict. c. 67, says, that all rules made under either of the Common Law Procedure Acts shall, *so far as the same are applicable*, extend to that Act. Now, would a rule, which orders proceedings to be stayed on payment of a certain amount within a given number of days, be consistent with an Act which directs a stay of proceedings upon payment of a different amount within the same number of days?]

The Court then called on

Hayes, who shewed cause in the first instance.—The ob-

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ject of the legislature was to afford additional facilities to the holders of bills of exchange in recovering their amount, not to place them in a worse situation. The 18 & 19 Vict. c. 67, recites, "that bonâ fide holders of dishonoured bills of exchange and promissory notes are often unjustly delayed and put to unnecessary expense in recovering the amount thereof by reason of frivolous or fictitious defences to actions thereon, and it is expedient that greater facilities than now exist should be given for the recovery of money due on such bills and notes." With such an object in view, the legislature could never have intended to throw the expense of the writ on the holder of the bill. The effect of the defendant's construction of the Act is to give four additional days of grace. The 8th section of the Common Law Procedure Act, 1852, may be incorporated with the 18 & 19 Vict. c. 67, without doing any violence to its language. If the word "thereof" in the indorsement prescribed by the latter Act had been omitted, the provisions of the two Acts would have been quite consistent. Effect cannot be given to the 18 & 19 Vict. c. 67, without calling in aid some of the provisions of the Common Law Procedure Act, 1852. The 1st section of the 18 & 19 Vict. c. 67, requires the writ of summons to be in the special form contained in the schedule, but the form in the schedule has blanks which cannot be filled up without referring to the 2nd section of the Common Law Procedure Act, 1852. Again, the teste is merely "Witness &c.," and recourse must be had to the 5th section of the same Common Law Procedure Act. So again, with respect to the indorsement of the residence of the attorney suing out the writ, the 6th section must be referred to. In like manner, in the indorsement of the plaintiff's claim, it is necessary to call in aid the 8th section. [*Platt, B.*—In the form in the schedule of the 18 & 19 Vict. c. 67, there is no blank for costs.] As that Act makes no mention of costs, it is necessary to refer

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to the 8th section of the Common Law Procedure Act, 1852, which requires the amount of debt and costs to be stated upon the writ and copy. [*Alderson*, B.—That would be introducing a provision inconsistent with the form of indorsement. The case might have been different if the right to costs depended on the Common Law Procedure Act, 1852; but it is given by the Statute of Gloucester. *Martin*, B.—The indorsement must be altered, in order to include the expenses of notice, which a plaintiff is enabled to recover by the 5th section of the 18 & 19 Vict. c. 67. What is the “unjust delay” mentioned in the recital of that Act? The not paying the bill when due. What is the “unnecessary expense?” The costs of the action. Then the Act intended to remedy those evils. *Platt*, B.—The language of the indorsement is analogous to an entry of a stet processus, in which neither party has costs.] At all events, the Court has power to amend the writ: *Knight v. Pocock* (a).

Cleasby in support of the rule.—The form referred to in the schedule of the Common Law Procedure Act, 1852, is applicable to all actions, while the 8th section applies to debts only; and therefore where the action is for the recovery of a debt, it is necessary to add to the indorsement the claim mentioned in the 8th section. The indorsement prescribed by the schedule of the 18 & 19 Vict. c. 67, is complete of itself; and the claim for costs could not be inserted without altering its language. The form of writ is new, for the defendant is not “commanded,” but “warned.” The circumstances, that the expense of noting are expressly provided for, whilst no mention is made of costs, leads to the inference that they were not intended to be given. The legislature may have thought that if a plaintiff chose to avail himself of the more summary remedy,

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the defendant ought to be at liberty to pay the debt within four days, without costs.

PARKE, B.—We are informed that a similar question is now pending in the Court of Queen's Bench; and as it is desirable that there should be an uniformity of decision in all the Courts, we will confer with the other Judges on the subject.

Cur. adv. vult.

HALL and Others v. COATES.

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THIS was also an action under the Summary Procedure on Bills of Exchange Act, 18 & 19 Vict. c. 67, and the indorsement on the writ contained a similar claim for costs.

Stammers (Nov. 10) obtained a rule nisi to set aside the copy and service of the writ for irregularity; against which

Montague Smith shewed cause (Nov. 17).—The application is too late. The writ was served on the 1st of November, and the present rule was not moved for until the 10th; so that it was returnable after the time when the plaintiff was entitled to sign judgment. [*Parke*, B.—It was moved before the expiration of the twelve days allowed for appearance, and that is sufficient. *Platt*, B.—The motion is clearly in time.]—He then argued that the indorsement of the claim for costs was allowed by the 8th section of the Common Law Procedure Act, 1852.

Stammers was heard in support of the rule.

Cur. adv. vult.

PARKE, B., now said—The question in these cases has arisen in all the Courts, namely, whether the indorsement on a writ under the Summary Procedure on Bills of Exchange Act, 18 & 19 Vict. c. 67, which contains a claim for costs, is in a proper form. The indorsement given by the statute is, “The plaintiff claims — pounds, principal, and interest due to him as the payee of a bill of exchange or promissory note, of which the following is a copy, &c. And if the amount thereof be paid to the plaintiff, or his attorney, within — days from the service hereof, further proceedings will be stayed.” The Judges have had a conference on the subject, and the question being an important one they have deliberated upon it. We are not all agreed upon the subject; but the majority are of opinion, that, by the incorporation of the Common Law Procedure Act, 1852, with the Act in question, the blank “within — days” may be filled up by inserting “four;” and that, in addition, a claim for costs may be inserted. All the Courts will adopt that construction of the Act, so that the question must now be considered as settled. Therefore, in the cases both of *Hall v. Coates* and *Robinson v. Cotterell*, the rule will be discharged, but without costs.

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Rules discharged without costs.

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COLE *v.* SHERARD.

Under the Common Law Procedure Act, 1852, a concurrent writ of summons can only be issued within six months from the time of issuing the original writ.

Where a writ of summons has been issued before that Act came into operation, and has been duly continued up to that time, the first renewal under that Act is quasi the original writ.

The Court will judicially notice the seal on a notarial certificate verifying an affidavit sworn before a magistrate abroad.

THIS was a rule calling on the plaintiff to shew cause why a concurrent writ of summons, and the service thereof, should not be set aside for irregularity.

The original writ of summons was tested the 9th of April, 1851. It was duly continued by alias and pluries, and was in force at the time when the Common Law Procedure Act, 1852, came into operation. It was first renewed under that Act on the 30th of November, 1852, and was afterwards renewed within every six months. The last renewal was on the 18th of May, 1855. On the 16th of June, 1855, a concurrent writ was issued for service upon a British subject residing out of the jurisdiction, and the defendant was served, at Jersey, with a copy of that writ on the 14th of July, 1855. This writ was tested the 9th of April, 1851.

The jurat of the affidavit in support of the application was as follows:—

“Sworn the 17th day of July, 1855, before me,

“PHIL. LE GALLAIS,

“Magistrate, Jersey.”

“I, Henry L. Manuel, notary public, by royal authority duly admitted and sworn, dwelling and practising at Saint Helier, Island of Jersey, do hereby certify that the signature, ‘Phil. Le Gallais, Magistrate, Jersey,’ written at the foot of the preceding page, and of the paper writing hereunto annexed, is of the own proper handwriting of Philip Le Gallais, Esq., one of the jurats or magistrates of the Royal Court of Jersey; and that the said Philip Le Gallais, Esq., is as such duly qualified to administer oaths in the

said Island.—In witness whereof I have hereunto set my hand and seal notarial at St. Helier's Jersey, aforesaid.

(L. S.)

"HENRY L. MANUEL,

"Notary Public."

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The rule was obtained on the grounds: First, that, under the Common Law Procedure Act, 1852, a concurrent writ of summons could not be issued where the original writ was sued out before that Act came into operation: Secondly, assuming that the first renewed writ under that Act was, for the purposes of that Act, the original writ, a concurrent writ could only be issued within six months from the issuing of that original writ: Thirdly, that the concurrent writ should have been tested of the same day as the first renewed writ.

Aspland shewed cause (Nov. 26).—There is a preliminary objection to this application, viz. that the affidavit in support of it cannot be read. The jurat purports to be verified by the certificate of a notary, but the Court will not take judicial notice of the notarial seal. It ought to have been verified by affidavit, or there should have been an affidavit verifying the signature of the magistrate, his office, and power to administer an oath: *Dalmer v. Barnard* (a), *Sharp v. Johnson* (b). [*Parke, B.*—In *Omealy v. Newell* (c), Lord *Ellenborough, C. J.*, says, "In a note subjoined to the case of *Sir John Walrond v. Van Moses*, Mich. 11 Geo. 1, being the year immediately preceding the stat. 12 Geo. 1, as reported in 8 Mod. 322, it is stated 'that the Court held that a plaintiff who was in Holland might make affidavit there, and get it attested by a public notary, and that it should be admitted *as evidence* to hold the defendant to special bail here,' In other words, that the Court might act upon evidence derived through the medium of an affidavit made abroad, as a sufficient founda-

(a) 7 T. R. 251.

(b) 2 Scott, 405.

(c) 8 East, 368.

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tion in point of fact whereupon to make an order for holding the defendant to bail." In the case of bills of exchange, the notarial certificate proves itself: Bayley on Bills, 487; *Anonymous* (a), *Hutcheon v. Mannington* (b). The recent Act for the amendment of the practice of the Court of Chancery, 15 & 16 Vict. c. 86, requires that Court to take judicial notice of the seal of a notary public, but that only recognises the general law of the land. *Pollock*, C. B., referred to the Documentary Evidence Act, 8 & 9 Vict. c. 113.]—He also cited *Ex parte Worsley* (c).

Secondly, the concurrent writ of summons is regular, The 12th section of the Common Law Procedure Act, 1852, provides for the renewal of writs issued and in force before the commencement of that Act, and it declares that "every such writ shall, after such renewal, have the same duration and effect for all purposes, and shall, if necessary, be subsequently renewed in the same manner, as if it had originally issued under the authority of this Act." Therefore the original writ in this action, having been duly continued up to the time when the Common Law Procedure Act, 1852, came into operation, the first renewal under that Act is in effect the same as a writ originally issued under that Act. By sect. 9, "The plaintiff in any such action may, at any time during six months from the issuing of the original writ of summons, issue one or more concurrent writ or writs, each concurrent writ to bear teste of the same day as the original writ," &c. "Provided always, that such concurrent writ or writs shall only be in force for the period during which the original writ in such action shall be in force." In that section the words "original writ" are not used in the sense of "first writ," but they mean "original writ" as distinguished from "concurrent writ," and consequently for the purposes of that enactment a renewed writ is an original writ. Unless

(a) 12 Mod. 345.

(b) 6 Ves. 823.

(c) 2 H. Bla. 275.

that construction be put upon the section, a plaintiff would be in a worse position than before, since proceedings to outlawry are now abolished: sect. 24. By section 11, "No original writ of summons shall be in force for more than six months from the day of the date thereof, including the day of such date; but if any defendant therein named may not have been served therewith, the original or concurrent writ of summons may be renewed at any time before its expiration, for six months from the date of such renewal, and so from time to time during the currency of the renewed writ," &c. By section 22, "A writ for service within the jurisdiction may be issued and marked as a concurrent writ with one for service out of the jurisdiction, and a writ for service out of the jurisdiction may be issued and marked as a concurrent writ with one for service within the jurisdiction." Reading these enactments together, they authorise the issuing of a concurrent writ under circumstances like the present.

Lush in support of the rule.—The provisions as to concurrent writs only apply to writs issued after the Common Law Procedure Act, 1852, came into operation. [*Parke, B.*—The 12th section says, that writs issued and in force at the commencement of that Act shall have the same effect *for all purposes* as if issued under that Act; but a plaintiff could not have the full benefit of that enactment if he could not issue a concurrent writ. That is a strong reason for reading the words "original writ" as the writ to which the other writ is to be concurrent.] Assuming that the statute applies to writs issued before its commencement, this concurrent writ is nevertheless irregular, for by the 9th section a concurrent writ can only be issued within six months from the issuing of the original writ. The words "original writ," in that section, are used in the sense of "first writ." The same words in the 11th section are used in contradistinction to "renewed writ." That sec-

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tion does not authorise the issuing of a concurrent writ in a case like the present, but only provides for the keeping in force the first writ, the provisions of the 2 Will. 4, c. 39, being repealed by the 10th section. Therefore, even if the effect of the 12th section is to render the first renewed writ after the Act came into operation the original writ for the purposes of that Act, still this concurrent writ cannot be supported, for it was issued more than six months after the first renewed writ. [*Parke, B.*—Cannot a concurrent writ be issued after a renewal of the original writ?] If a concurrent writ is issued within six months of the issuing of the original writ, that concurrent writ may be renewed at any time before its expiration: (sect. 11); but where the original writ has been renewed, no concurrent writ can afterwards be issued. If a plaintiff wishes to issue a concurrent writ, he must make his election within six months after he has sued out the original writ.—He also argued that the concurrent writ should have been tested of the same day as the first renewed writ under the Common Law Procedure Act, 1852.

Cur. adv. vult.

PARKE, B., now said—This was a rule to set aside a concurrent writ of summons for irregularity. The original writ appears to have been sued out in the year 1851, and duly continued until the Common Law Procedure Act 1852, came into operation, when it was renewed under that Act; and there have been subsequent renewals up to the present time. A concurrent writ of summons issued more than six months after the first renewal, and the question is, whether that is allowable by the Common Law Procedure Act, 1852. We have considered the case, and, looking at the different clauses of the Act, are of opinion that a concurrent writ can only be issued within six months from the time of issuing the original writ. In this case, the first renewed writ under the Common Law Procedure Act, 1852,

became quasi the original writ; but then the concurrent writ should have been issued within six months from the time of issuing that writ. Such is the plain language of the Act. This concurrent writ having been issued after that time must be set aside, but, as this is a new point of some importance, without costs.

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Rule absolute accordingly. .

LOWNDES v. FOUNTAIN and Others.

Dec. 1.

THE declaration stated that the defendants were tenants to the plaintiff of certain lands, situate in the county of Buckingham, upon the terms (amongst others) that the defendants should not, during their tenancy, sell any hay or straw, grown upon the said lands, off the said lands, without the consent of the plaintiff or his agent, except the defendants should return the value of the straw so sold off as aforesaid in manure upon the said lands.—Averments: that the plaintiff hath done all things necessary to entitle him to have the terms of the tenancy kept by the defendants; and that the defendants' tenancy of the said lands, upon the terms aforesaid, continued for a long space of time, and expired upon the commencement of this suit.—Breach: that the defendants, during their tenancy, sold divers large quantities of hay and straw, grown upon the said lands, off the said lands, without the consent of the plaintiff, or any agent of the plaintiff, and did not during their said tenancy

A farming agreement contained the following clause:—"No hay or straw to be sold off the said land without consent of the landlord or his agent, except the value of the straw so sold off be returned in manure on the said land."—*Held*, per *Pollock*, C. B., and *Parks*, B., that, if the tenant sold the hay or straw, he was only bound to spend upon the land as much manure as the straw would have

produced; Per *Alderson*, B., and *Platt*, B., that the tenant was bound to return in manure the price or market value of the straw.

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return, nor have they since returned, upon the said lands or any part thereof, in manure or otherwise, the value of the said straw so sold off as aforesaid, or any part thereof.

Plea.—Payment into Court of 30*l.*, and that that sum is sufficient to satisfy the plaintiff's claim.

Replication.—That the sum is not sufficient to satisfy the plaintiff's claim.—Upon which issue was joined.

At the trial, before *Alderson*, B., at the last Buckingham Assizes, it appeared, that, at Lady-day, 1853, the plaintiff let to one Boreham, as yearly tenant, about seventy-seven acres of land, situate at Winslow and Great Horwood, in the county of Buckingham. In April, 1854, Boreham, being in difficulties, assigned his estate and effects to the defendants for the benefit of his creditors. On that occasion an agreement in writing was signed by Boreham, stating the terms of his tenancy, and which, after providing for the rent, &c., contained the following stipulation:—

“No hay or straw to be sold off the said land without consent of the landlord or his agent, except the value of the straw so sold off be returned in manure on the said land.”

The defendants took possession of the land on those terms, and continued to occupy it until Lady-day, 1855, when the plaintiff determined the tenancy by notice to quit. During their tenancy the defendants sold all the straw off the land, claiming to do so for the benefit of the creditors of Boreham, and they did not return any manure on the land. It appeared that the selling price of the straw was 1*l.* a ton, but that its value, if spent in manure, would be but 7*s.* a ton.

It was submitted on behalf of the defendants, that, according to the true construction of the agreement, they were only liable in damages for the value of the straw if spent in manure. On the part of the plaintiff it was contended, that the measure of damage was the selling price of the straw. The learned Judge was of that opinion, and a ver-

dict was found for the plaintiff, with damages so calculated, leave being reserved to the defendants to move to reduce the damages if the Court should be of opinion that the learned Judge had erroneously construed the agreement.

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Prendergast in the following Term obtained a rule nisi accordingly; against which

O'Malley (*Wortledge* with him) shewed cause (Nov. 20).—The meaning of the agreement is, that the tenant shall bring back in manure the market price or value of the straw sold off. The language is not "except manure equivalent to the straw be brought back," but, it is, "except the *value* of the straw be *returned* in manure." The value of the straw is what it will sell for. [*Alderson*, B.—I thought that the meaning of the agreement was this: "If you sell off the straw, you shall bring back the money you get for it in manure."] Stipulations of this kind are inserted with a view to the termination of the tenancy. In many cases it is more beneficial for the landlord to have manure than straw, and therefore he provides that the tenant shall either leave the straw or give its value in manure. [*Parke*, B.—The stipulation is not in poenam, as for instance, that the tenant shall not sell except under a penalty: it is not a condition precedent, but a condition subsequent. Its meaning is, that the tenant shall not take away the straw, or if he does that he shall bring back its value in manure. *Pollock*, C. B.—It is clear that the tenant is not restrained from selling off the straw, but he is at liberty to do so provided he brings back its value in manure. Some person might want the straw, and would be willing to give for it a price beyond its farm value; or it may be, that there is a greater quantity than the tenant has occasion for, so that it would be more profitable to sell it and return its value in manure; but, if the tenant is merely at liberty to take the price for which it sells, and bring back that in manure, he

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would receive no benefit.] The words "in manure" designate the form in which the value is to be brought back, not the mode in which the value is to be estimated. The stipulation was introduced, not for the benefit of the tenant, but for the benefit of the landlord, its primary object being that he should have all the straw consumed on the land. [Parke, B.—Its meaning is, "if you sell off the straw, you must put the land in as good condition as if the straw so sold off had been spent on it."]

Prendergast and *Wells* in support of the rule. — The tenant has a right to sell the straw, provided he puts on the land the same quantity of manure as there would have been if he had left the straw. The value of the straw is its value as manure, and the agreement means that the tenant shall restore to the land what it loses by the removal of the straw—that is, the manure power of the straw. If the tenant were obliged to bring back in manure the price of the straw, the stipulation would amount to a prohibition against removing it. That could never have been the intention of the parties, for it might happen that the tenant, from loss of his cattle, would not have the means of turning the straw into manure, in which case the landlord would benefit by the tenant selling the straw and returning its value in manure. The object of the stipulation was, that the landlord should not be in a worse condition than if the straw had remained on the land.

Cur. adv. vult.

PARKE, B., now said.—In this case, which was tried before my Brother *Alderson*, a motion was made to reduce the damages. The declaration contained a count for the breach of a farming agreement, under which a person, whom the now defendants represent, originally occupied, and the terms of the contract are admitted by the payment of money into Court. The question depends entirely on

the construction of the following clause in the agreement; as to which, unfortunately, we do not concur: "No hay or straw to be sold off the said land without consent of the landlord or his agent, except the value of the straw so sold off be returned in manure upon the said land." At the trial, my Brother *Alderson* was of opinion, that, if the tenant chose to sell the hay or straw off the land without the consent of the landlord, he was bound to replace the price for which it sold or ought to have sold, that is, its full value, in the purchase of manure, and expend it on the land. On the other hand, it was argued, that, putting a reasonable interpretation on the clause, it was not the price of the hay or straw, but its manure value which ought to be expended; so that the landlord would lose nothing if as much manure was brought back and spent upon the land as the hay or straw would have produced if it had not been sold. The Lord Chief Baron is of that opinion, and in which also I concur. The difficulty arises from the use of the word "value." If the word had been "price" instead of value, then all the hay or straw sold off must have been expended in the purchase of manure, and a much larger quantity of manure would have been returned than the hay and straw would have produced if it had not been sold off. My Brother *Alderson* retains his opinion, and my Brother *Platt* concurs with him. They think that the term "value" means the value of the straw itself; and that that is to be laid out in the purchase of manure and spent upon the land. If, indeed, this were in the nature of a penal clause, there would be reasonable ground for concluding that the word "value" meant the market value of the hay or straw, because that would be required to be brought back, in order to prevent the tenant from carrying off the hay or straw at all. The Lord Chief Baron and myself think that this is not a penal clause, and that it merely meant to keep the parties in statu quo. "You may sell the hay and straw off the land, but you shall do no injury to the farm. You shall

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bring back a quantity of manure equal to that which the hay or straw if left on the land would have produced." There being a difference of opinion, no rule will be granted.

PLATT, B.—It seems to me that this is by no means to be considered as a penal clause, though it was certainly meant to discourage the tenant from carrying the hay and straw off the land, by making him accountable for the price he got for it. Reading the words of the clause according to their natural meaning, I cannot conceive anything more plain. I may be mistaken, but it does appear to me, that, whether the word used be "price" or "value," it is precisely the same thing. The clause means, that whatever the tenant gets by selling off the hay or straw must be returned in manure.

Rule refused.

MEMORANDA.

ON the 5th of January, 1856, the Right Hon. Sir *James Parke* resigned the office of Baron of the Court of Exchequer. He was created a Peer of the Realm for the term of his natural life, by the title of Baron Wensleydale, of Wensleydale, in the North Riding of the county of York. The dignity of a Baron of the United Kingdom was afterwards granted to him and the heirs male of his body, by the title of Baron Wensleydale, of Walton, in the county Palatine of Lancaster.

He was succeeded by *George William Wilshere Bramwell*, of the Inner Temple, Esquire, who had previously been called to the degree of the coif, when he gave rings with the motto, "Diligenter," and afterwards received the honour of Knighthood.

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WOOD v. DWARRIS and Others.

Jan. 23.

THE declaration stated, that, by a policy of assurance signed by the defendants as three of the directors of the "Equity and Law Life Assurance Society," after reciting that the plaintiff had proposed to effect an assurance with the society on the life of J. Webster, of &c., for the whole duration thereof, in the sum of 700*l.*, and had delivered into the office of the society a declaration in writing signed by A. Steele for the said assured, stating (amongst other things therein set forth) that the age of the said J. Webster did not exceed forty years; that he had had the cow pox, had not had the gout, &c. (stating certain diseases), and that he was then in good health, &c.; and that the assured had an interest in the life of the said J. Webster to the full amount of the sum of 700*l.*; which declaration the said assured had agreed should be the basis of the contract between himself and the

Where a plaintiff sues on a written contract, and the defendant pleads as a defence matter which he is in equity precluded from setting up by a term of the contract, not stated in the written instrument, a Court of law may, under the "Common Law Procedure Act, 1854," give equitable relief without the instrument being first reformed.

To a declaration on a policy of assurance, the defendant pleaded that the policy was made upon the terms of a previous proposal, and upon the express condition, that, if any statement in the proposal was untrue, the policy should be void, and that a particular statement was untrue. Replication on equitable grounds: that, before the policy was made, the defendants issued a prospectus containing a statement, that all policies effected by them should be indisputable, except in cases of fraud; and that the plaintiff effected the policy on the faith of such representation. Rejoinder: that the policy was made on the basis of the proposal; and that there was not, before or at the time of the making of the policy, any promise by the defendants that the policy should be indisputable except in cases of fraud, except that, before the proposal, the defendants issued the prospectus containing such statement:—*Held*, that the rejoinder was bad, and that the replication was, on equitable grounds, a good avoidance of the plea.

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society. Also, after reciting that the board of directors of the society, relying on the truth of such declaration, had undertaken the proposed assurance at the annual premium thereafter mentioned; and that the said assured had paid to the society the sum of 22*l.* 5*s.* 1*d.* as the premium for such assurance for the period of one year ending on the 1st day of October, 1852: It was witnessed and declared, that, if the said J. Webster should die before or on the 1st of October, 1852, or should live beyond such day, and the assured or his assigns should on or before the 2nd day of October then next ensuing, and on or before the same day in every subsequent year during the continuance of that assurance, pay to the said society the annual premium of 22*l.* 5*s.* 1*d.*, then, and in such case, the funds or property of the said society should, according and subject to the provisions of the deed of settlement of the society, be liable to pay to the said assured, his executors, &c., within three calendar months after proof, satisfactory to the board of directors of the said society, should have been given of the death of the said J. Webster, the sum of 700*l.* &c. Averments:—that, at the time of making the policy, and from thence until the death of J. Webster, the plaintiff was interested in the life of J. Webster to the amount of the monies insured; that at the time of making the policy of insurance the said J. Webster was in good health, and did not exceed the age of forty years, &c.; and that afterwards, to wit, on the 28th day of November, A. D. 1854, the said J. Webster died, of which death the society had notice: and although satisfactory proof was afterwards given to the board of directors of the society of the death of J. Webster, and although three calendar months from the giving of such satisfactory proof had elapsed before the commencement of this suit, and although the plaintiff during the continuance of the policy duly paid all the said annual premiums reserved thereby, and hath done and performed all conditions

precedent, and all things have happened which it was necessary should have happened, before the commencement of this suit, to entitle the plaintiff to sue for and recover the said monies so assured to him by the said policy; and although the funds and property of the society remaining unapplied were and are sufficient to pay and satisfy the said claim and demand of the plaintiff in respect of the said policy; yet the society (although requested so to do) did not nor would, nor did nor would the defendants, within three calendar months after such proof was so given of the death of J. Webster, or at any time afterwards, pay to the plaintiff the said sum of 700*l.* &c.

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Plea.—That by the policy of assurance it was provided, amongst other things, that the policy was declared to be made upon the express condition, that if any statement or allegation contained in the declaration thereinbefore referred to, being the said declaration in writing signed by the said A. Steele, were untrue, or if the assurance thereby made should have been obtained through any misrepresentation, concealment, or untrue averment whatsoever, then the policy should be null and void. That the said declaration did contain a false and untrue statement and allegation, that a proposal for life insurance on the life of the said J. Webster had been made then very recently to the Legal and Commercial Fire & Life Assurance Society, 73, Cheapside, and had been accepted: whereas in truth and in fact, neither at the time of the writing of the said policy, nor at any other time, had a proposal for life assurance on the life of the said J. Webster been made to and accepted by the said Legal and Commercial Fire and Life Assurance Society.

Replication upon equitable grounds.—That, before the policy was entered into as in the declaration alleged, the defendants published to the plaintiff and others a prospectus, stating their intention to carry on the business of

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insurance upon lives, and to make such insurances as in the declaration mentioned; and the defendants thereby stated, represented, and understood, to and with the persons who should effect insurances with them, and amongst others to and with the plaintiff, severally and respectively, that all policies which should be effected by such persons or the plaintiff, severally and respectively, with the defendants, and among others the policy in the declaration mentioned, should be indisputable except in cases of fraud. That the plaintiff was induced by the defendants to effect, and effected, the policy in the declaration mentioned, with the defendants, in consequence of and upon the faith of the said statement, representation, and undertaking; and that by reason of the premises it was in equity subject to the terms that it should be indisputable except in case of fraud. That the alleged false and untrue statement and allegation in the plea mentioned was not fraudulent, and there was not any fraud whatsoever in such statement and allegation.

Rejoinder.—That, after the publication of the prospectus as therein mentioned, the plaintiff proposed to effect the said insurance with the said Equity & Law Life Assurance Society, and delivered into the office of the said society the said declaration in writing signed by the said A. Steele for the said plaintiff, as recited in the said policy and mentioned in the declaration in this cause; and that, in and by such proposal and declaration so delivered in as aforesaid to the said office of the said society, being the declaration in the policy mentioned, the plaintiff declared that the particulars therein above written (and which included the statement and allegation mentioned in the plea) were correct and true throughout; and thereby further declared, that he had an interest in the life of the said J. Webster to the full amount of 700*l.*; and thereby agreed, that that proposal and declaration should be the basis of the contract

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between the plaintiff and the society ; and that, if it should appear that any fraudulent concealment or untrue statement was contained therein, or in any certificate or statement connected with the said proposed insurance, furnished or made by him or on his behalf, then all the money which should have been paid on account of assurances made in consequence of the said proposal and declaration should be forfeited, and the policy granted in respect of such assurance should be absolutely null and void. That the said declaration did contain a false and untrue statement, as in the said plea alleged ; and that the said policy of assurance in the declaration mentioned was the policy granted in respect of the said assurance so proposed in manner aforesaid, and was agreed to be made, and was made, upon the terms and upon the basis of the said proposal and declaration, and not otherwise, and always contained, and still contains, the said proviso and condition in the said plea mentioned and set forth ; and that, at the time of the making of the said policy, there was not any promise or undertaking by the defendants or the said society that that policy should be indisputable except in cases of fraud, nor was there at any time before the making of the policy any statement, representation, or undertaking by the said society or the defendants to the effect in the replication mentioned, except by the defendants and the said society having, before the said proposal by the plaintiff, issued prospectuses to the public, in which it was stated that all policies which should be effected with the said society should be indisputable except in cases of fraud.

Demurrer and joinder therein.

Manisty in support of the demurrer. — Upon these pleadings the plaintiff is entitled to judgment. The replication states, that, before the policy was entered into, the defendants published a prospectus, by which they repre-

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sented that their policies should be indisputable except in cases of fraud; and it is averred, that, upon the faith of such representation, the plaintiff was induced to effect the policy in question, and that the false statement mentioned in the plea was not fraudulent. The rejoinder does not deny those facts, but merely alleges that the defendants did not make such representation at the time of effecting the policy, or at any other time, except by the prospectus which they issued. That is no answer to the replication, which discloses matter in the nature of an estoppel.—The Court then called on

Bovill (*Turner* with him) *contra*.—The plaintiff, by his replication, sets up a contract inconsistent with that alleged in the declaration. The policy was effected on the terms of the proposal, not on the terms of the prospectus; and if the latter was really intended to form part of the contract, the plaintiff should apply to a Court of equity to reform the policy. The replication is no answer to the plea on equitable grounds; for it is an established rule of equity, that where there is a valid instrument the Court will give effect to it; and if either party relies on something not included in the instrument he must get it reformed. In *Jacobs v. Richards* (a), Sir J. Romilly, M. R., says, "I apprehend there are two principles upon which this Court acts, and which are rather principles of practice than of law, and have been adopted for the convenience of conducting suits. One is, that where a deed *primâ facie* good at law is brought before it, this Court, in the exercise of its ordinary functions and jurisdiction, acts on it until it has been set aside. The other is, that this Court does not give a defendant active relief." So in *Graham v. Ackroyd* (b), where a creditor, at the date of a deed of trust made by a debtor

(a) 18 Beav. 303.

(b) 10 Hare, 192.

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for the benefit of his creditors, had a claim against the debtor for an ascertained sum of 1974*l.*, and an unascertained sum on account of acceptances which he had given to the debtor on goods shipped by the debtor through the creditor as his factor on a del credere commission, and which had not then been sold, of which acceptances 5000*l.* had then become due; and the creditor in this state of things executed the deed generally, without specifying the amount of his debt; and upon the ultimate account, after the goods were sold, it appeared that a balance of 5348*l.* was due to the creditor: it was held that he was entitled to a dividend from the debtor's estate for the sum of 5348*l.*, and not merely for the sum of 1974*l.* Sir *W. P. Wood*, V. C., there says, "In determining the question whether the plaintiffs can maintain their claim to be paid the dividends in respect of the balance of 5348*l.*, no weight can, I think, be given to the allegations contained in the answers of the defendants, and in the evidence on their part, as to the plaintiffs having unduly executed the deed without having limited their execution to the 1974*l.* The plaintiffs have, in fact, executed the deed without such limit; and it is, as I apprehend, the duty of the Court to give them all the rights which are incident to such an execution, so long as those rights are not extinguished or reduced by judicial decisions: and there are here no proceedings on the part of the defendants to extinguish or reduce them. The defendants, if they meant to rely upon this part of their case, ought, I think, to have filed a cross bill to set it up. No decree can, in my opinion, be made in their favour in this suit in respect of such a matter as this. It is not, I think, different from the ordinary case of a defendant attempting to impeach by answer and by evidence a deed which is sought to be enforced." Applying those principles to the present case, if the plaintiff had filed a bill in equity to enforce his contract, the answer would have been, that the contract is contained in the policy, and that the rights of

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the parties must be determined by it, unless the plaintiff takes some step to get it reformed. Under the Common Law Procedure Act, 1854, the same rule ought to prevail in a Court of law. The plaintiff is suing on the policy, and it is not competent for him to set up matter not contained in it. His declaration alleges a legal claim; but in his replication he relies on an equitable right. That is equivalent to bringing an action at law in respect of an equity. But further, this is not a case in which a Court of equity would reform the policy. The ground for the interference of that Court is fraud or mistake. Fraud cannot be suggested, for the policy is in the very terms of the proposal; and in case of mistake, the Court only affords relief where it is the mutual mistake of both parties. Here, however, the defendant affirms that the policy was effected on the terms of the proposal, whilst the plaintiff alleges that it was effected on the terms of the prospectus. In Smith's Manual of Equity Jurisprudence, p. 44, it is said, "It should be observed, that, where the final instrument of conveyance or settlement differs from the preliminary contract, that very circumstance affords of itself some ground for presuming an intentional change of purpose, unless, from some recital in it, or from some attendant circumstance, it appears to have been intended to be merely in pursuance of the original contract." So, in Story's Equity Jurisprudence, sect. 160, it is said, "But in all such cases it must be plainly made out, that the parties meant in their final instruments merely to carry into effect the arrangements designated in the prior contract or articles. For as the parties are at liberty to vary the original agreement, if the circumstances of the case lead to the supposition that a new intent has supervened, there can be no just claim for relief upon the ground of mistake." The same author, in speaking of wills, observes, that "the mistake, in order to lead to relief, must be a clear mistake, or a clear omission demonstrable from the structure and scope of the will;"

sect. 180. Unless it appeared by the clearest evidence that both parties intended that the policy should be effected on the terms of the prospectus, a Court of equity would not interfere: *Hodges v. Horsfall* (a). The replication can only be good on the ground that the policy was effected on the terms of the prospectus; and it is answered by the rejoinder, which shews that the policy was effected on the terms of the proposal.

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Manisty was not called upon to reply.

POLLOCK, C. B.—This is an action on a policy of assurance, to which the defendants put in a plea which is a *prima facie* answer to the action. The plaintiff replies, that on equitable grounds the defendants ought not to set up such a defence, because it is inconsistent with the terms of their prospectus, upon the faith of which the policy was effected. The defendants by their rejoinder say, that it is true they did publish such a prospectus, but the proposal and not the prospectus was the basis of the contract. That is inconsistent and repugnant, because it professes to deny, but in truth admits, the facts stated in the replication. Therefore the rejoinder is bad; and it becomes necessary to consider whether the replication is good. In the exercise of a new power involving questions other than those with which the Court is familiar, I have been anxious not to assume a jurisdiction beyond that which the statute clearly confers. But on consideration, I think that, notwithstanding the case of *Jacobs v. Richards* (b), the plaintiff is entitled to judgment. It has been argued, that the Court cannot look to the prospectus as controlling the contract, because a Court of equity would not regard it unless the plaintiff filed a bill to reform the policy. It is true, that, if a plaintiff seeks to enforce in a Court of equity the specific

(a) 1 Russ. & M. 116.

(b) 18 Beav. 300.

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performance of an instrument *prima facie* good at law, the defendant cannot set up as a defence that the instrument does not disclose the real contract, which is open to some objection either on the ground of fraud, or usury, or simony, &c., but the defendant must file a cross bill to have the instrument reformed. The reason is, that a Court of equity acts upon certain rules peculiar to such a Court, but no such rules prevail in a Court of law. There are cases in which a Court of equity, in reforming an agreement, would require the parties to be placed in *statu quo*, which a Court of law would not do. Therefore, I am disposed to hold, that, under the 83rd section of the Common Law Procedure Act, 1854, this replication affords a good equitable defence. It certainly discloses matter which renders it inequitable that the plea should prevail, and I think that we ought to give effect to it and decide in favour of the party who has the equitable right. It has however been expressly decided by Vice-Chancellor *Turner*, in the case of *Collett v. Morrison* (a), that if upon a proposal and agreement for a life insurance, a policy be drawn up by the insurance office in a form which differs from the terms of the agreement, and varies the rights of the party assured, a Court of equity will interfere and deal with the case upon the footing of the agreement and not of the policy. In that case the Court did not require the policy to be reformed, but decided on what was the real contract between the parties. Therefore, apart from what appears to be the true construction of the 83rd section of the Common Law Procedure Act, 1854, it seems to me that a Court of equity would have dealt with this case as if the terms of the prospectus had been embodied in the policy. Moreover, I think that, under the statute, if a defence is set up which ought not to have been pleaded, and to which there is a good equitable answer; we ought to admit it,

(a) 9 Hare, 162.

notwithstanding a Court of equity may be precluded by its rules from entertaining such a defence until the contract has been reformed.

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ALDERSON, B.—I am of the same opinion. The rejoinder is clearly bad, and the only question is, whether the replication is good. Now, the plea in substance states that the policy was made upon the express condition, that if any statement contained in the proposal were untrue, the policy should be void; and it is averred that a particular statement made in the proposal was untrue. That would have been a perfectly good defence, if the policy had been effected on the terms mentioned in the proposal. But then, the plaintiff rejoins on equitable grounds, that, before the policy was entered into, the defendants issued a prospectus, by which they represented that all policies effected by them should be indisputable, except in cases of fraud. That was holding out to all the world that they would require no proof of the truth of the matters stated in the proposal, but would only dispute the claim on the ground of fraud. So that the word “untrue” in the proposal really means “fraudulent.” When the plaintiff went to their office, the defendants professed to grant him an assurance on those terms; therefore, they cannot now set up as a defence that the statement in the proposal was untrue, unless they add that it was *fraudulently* untrue, for they have, in fact, said that they will never make any other defence. Then it is inequitable in them to do so. The replication contains an averment that the untrue statement alleged in the plea was not fraudulent, and the only proper issue which the defendants could take was by denying that allegation.

MARTIN, B.—I am also of opinion that our judgment ought to be for the plaintiff. The principal question is, whether the facts stated in this replication avoid the plea on equitable grounds. I am of opinion that they do; be-

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cause the defendants, having induced the plaintiff to effect the policy upon the faith of the prospectus, a Court of equity would not allow such a plea. Mr. *Bovill* has argued that this policy was effected upon the terms of the proposal, and not of the prospectus. No doubt it would be competent for the company to grant a policy upon terms which excluded the prospectus; and if that were so, the defendants would be justified in resisting this action, and might simply have traversed the replication; for the plaintiff is bound to prove, not only that such a prospectus was issued, but also that the policy was made on the terms of that prospectus; and therefore, if the defendants, instead of rejoining as they have done, had taken issue on the replication, and what is now alleged on their behalf be true, they would have obtained the verdict. *Jacobs v. Richards* (a) has been relied on as an authority, that we cannot in this case give equitable relief. But the doctrine there laid down has no reference to a case like this. The Master of the Rolls says, that the principles to which he refers are rules of practice, not of law. That was an ordinary claim for foreclosure; in answer to which, the defendant sought to avoid the mortgage deed, which was *prima facie* good. This is a case in which a Court of equity would have interfered to prevent this defence being set up, without reforming the policy; for the Court would have said that it was made under circumstances which rendered it inequitable that such a defence should be pleaded. The Common Law Procedure Act, 1854, enables a Court of law to give the same relief. The passages cited from the works of Smith and Story are perfectly correct, and consistent with reason and good sense; but they have no bearing on this case, because the object of the plaintiff is not to correct a mistake, but to prevent an inequitable defence from being set up. For these reasons, I think that the re-

(a) 18 Beav. 300.

plication is good. Then, with respect to the rejoinder,—according to Mr. *Bovill's* argument, it is good, because it in substance amounts to a denial of the replication. But where the law has prescribed a direct mode of traverse, if a party, instead of adopting that short and simple form, encumbers the record with a long, unintelligible, and repugnant statement, I am by no means prepared to say that such a pleading is not bad on general demurrer; for it tends to impede the course of justice, and cast additional trouble on those concerned in the administration of it. The ground, however, on which my judgment proceeds is, that the rejoinder does not in truth amount to a denial of the replication, but admits the facts stated in it; and that the rejoinder being bad, the demurrer is no confession, for a demurrer only admits those facts to be true which are well pleaded.

Judgment for the plaintiff.

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PEREZ and Another v. OLEAGA and PARIS.

To an action for the non-performance of an alleged agreement to load a ship for a particular voyage with a guaranteed freight of not less than 5500*l.*, the Court refused to allow the defendant to plead, by way of equitable defence, that the real contract was, that the ship should earn freight at such a rate per ton, that, if filled, she would obtain 5500*l.*; and that, by mistake of the person who reduced the contract into writing in the Spanish language, which he imperfectly understood, it was described as an absolute guarantee that the ship should have a freight of 5500*l.*

Quære, whether the subject-matter of the proposed plea might be given in evidence under a denial of the contract.

THE declaration stated, that it was agreed between the plaintiffs, being owners of a ship called the "Primera de Santander," and the defendants, that the said ship, then lying at the port of Liverpool, should be given up for the exclusive benefit of the owners, to be loaded on commission by the defendants, the owners to allow the defendants 7*l.* 10*s.* per cent for the whole freight as soon as that contract should be signed; that when the vessel should be loaded and cleared, she should sail for Manilla, &c., the defendants to load the vessel on commission for Manilla, with a guarantee of 5500*l.*; and that the defendants would procure a cargo for the voyage rendering not less freight to the owners of the ship than the sum of 5500*l.*, this serving as the basis to cover, as far as the above amount, the deficit which might result in the entire amount of all the freights in the ship; and in case the freight of the cargo in the ship for the voyage did not amount to 5500*l.*, the defendants would pay to the owners the difference between the freight procured and that sum; and whatever amount there might be in excess of that guarantee should be for the exclusive benefit of the owners of the ship; and that the expressed guarantee being constituted in reference to freights, should remain subject to the above-mentioned commission of 7*l.* 10*s.* per cent.—Averments of performance on the part of the plaintiffs: that the ship sailed on the voyage, and the whole amount of the freights of the cargo shipped for it, and of the freight procured for it, did not amount to 5500*l.* but to a much less sum, to wit, 3000*l.*—Breach: that the defendants had not paid the difference.

The defendants proposed to plead (*inter alia*.) under the 17 & 18 Vict. c. 126, s. 83, the following plea as a defence

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on equitable grounds—"That the agreement was made by the defendant C. Paris on behalf of the defendants, on the one part, and Blas de Guido, an agent on behalf of the plaintiffs, on the other part; that in July, 1854, the said Blas de Guido, master of the Spanish ship "Primera de Santander," of which the plaintiffs are owners, addressed himself, shortly after his arrival at Liverpool with the said ship, to the defendants, who are shipbrokers there, for the purpose of obtaining a cargo for the said ship from Liverpool to Manilla; that at first it was proposed by the captain, acting as such agent of the plaintiffs, that the defendants should charter the ship for the said voyage, and the defendants offered to charter the same, for the sum of 4000*l*.; that the plaintiffs' said agent refused such offer; that it was thereupon proposed by the defendants that they should load the ship on commission at the usual brokerage of 7*l*. 10*s*. per cent. on the amount of freight which the vessel might earn; that the plaintiffs' said agent objected to load on commission, on the grounds that he did not know what his ship would carry, and had not had any experience as to what the average freight per ton would be when loaded; and that some other ship might be loading for the same port, and that the competition might reduce the rate of freight; that thereupon, for the purpose of meeting such objections, the defendants offered, after the captain's explanation of the quantity of other cargo the ship had carried, to give a guarantee that the ship should carry freight at a certain average per ton, so that she should obtain a freight of 5500*l*. if filled; and the defendant C. Paris then made a calculation, and shewed it to the plaintiffs' agent, whereby it appeared that if goods were shipped at the average rate of 70*s*. per ton, and the ship were fully loaded, the freight for the said voyage would amount to 5500*l*.; that the plaintiffs' agent then asked the defendant C. Paris if the defendants would guarantee that the vessel should be fully loaded at that rate; upon which the defendant C.

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Paris, upon the plaintiffs' agent stating that other brokers in the trade had refused such guarantee, answered that they would not give such a guarantee, for that the time limited by the defendants' agent for the loading of the ship would not enable the defendants to load the ship fully; but the guarantee which the defendants were willing to give was, that the rate of freight for the goods should be such that if the ship were full she would earn 5500*l.*, and such sum should serve as a basis by which to measure the rate of the freight actually on board if the ship were not fully loaded, the defendants offering to guarantee that whatever quantity of goods should be shipped in the said vessel should produce freight at such a rate as, had the ship been fully loaded, would have made the freight 5500*l.*, such guarantee offered by the defendants being, that the goods shipped should produce a certain rate of freight per ton, but not so as to bind the defendants that the ship should earn either 5500*l.*, or any other certain sum as freight: that it never was agreed between the plaintiffs and the defendants, that the defendants should load the vessel on commission for Manilla, with an absolute guarantee of 5500*l.*; nor did the defendants ever agree with the plaintiffs that they would procure cargo for the said voyage rendering not less freight to the owners than the sum of 5500*l.*; nor did the defendants ever agree with the plaintiffs, that in case the freight of the cargo in the said ship for the said voyage did not amount to 5500*l.* the defendants would pay to the owners of the said ship the difference between the freight procured and the said sum of 5500*l.*: that the commission of 7*l.* 10*s.* per cent. agreed to be paid to the defendants for loading the said ship was, at the date of the said contract, the lowest rate of commission at Liverpool for loading a ship for Manilla without guarantee; and no consideration whatever was paid, or agreed to be paid, to the defendants for the said guarantee; and if the defendants had agreed to give such guarantee they would have required a much

higher rate of commission than 7l. 10s. per cent. on the amount of freight: that the said C. Paris, who conducted the said negotiation on the part of the defendants, is imperfectly acquainted with the Spanish language, in which the contract is written, and such contract was signed by him on behalf of the defendants under the belief that the said contract bound the defendants to load the said ship, so far as she might be loaded, at the guaranteed rate of freight, but that it did not bind the defendants that the ship should earn 5500l., or any other sum of money whatever, for freight on the said voyage; and at the time the said contract was prepared, the said C. Paris gave orders to the Spanish corresponding clerk of the defendants to prepare the contract in the Spanish language, and in the guarantee clause expressly to stipulate that the defendants only guaranteed the 5500l. if the ship was full, and not to insert anything in the said contract which should make the defendants liable to fill the ship: that the defendants' corresponding Spanish clerk, after having prepared the contract in the Spanish language, was questioned by the defendant C. Paris as to the way in which the guarantee clause was expressed, and was assured by him that the contract was expressed in Spanish as the defendant C. Paris had directed, and that the contract would be so interpreted by any Spanish court of law; and the said Spanish clerk altered one or two words to make the meaning of the defendant C. Paris more clear; and the plaintiffs' agent took two days to consider the contract before signing it; and at the time the contract was signed the defendant C. Paris stated, in the presence and hearing of the plaintiffs' agent, that he understood that the meaning of the entire contract was merely that the defendants should do the best they could for the ship, as if she was their own; and that the guarantee in the written contract was such limited guarantee as aforesaid, and not that the ship should be fully loaded at the rate aforesaid, or at any rate of freight; and the plaintiffs' agent

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did not in any manner dissent from such statement; and a similar statement was made to one of the owners of the ship Francisco Maranon, who stated that he considered the guarantee to extend to the rate of freight only: that the said ship was afterwards loaded by the defendants on commission, but did not obtain a full cargo, but the average rate of freight for the cargo shipped exceeded the rate guaranteed by the defendants: that the defendants had in all respects fulfilled the guarantee which they agreed to give, and which they believed they had given, as to the loading of the said ship; but by the mistake of the person by whom the contract was written out in the Spanish language, the written contract signed by the parties does not express the contract actually made between the parties, but is very materially different therefrom, such written contract containing an absolute guarantee by the defendants that the ship should have a freight of 5500*l.*, contrary to the true intent and meaning of the contract actually entered into between the parties thereto: that the plaintiffs are in this action unjustly availing themselves of the mistake so made in reducing into writing in the Spanish language the contract between the plaintiffs and defendants, notwithstanding the performance by the defendants of the guarantee agreed by them to be given as to the loading of the said ship."

This plea having been disallowed by a Judge at chambers,

Burns moved for leave to plead the plea in question (Jan. 15).—The plea affords a good equitable defence under the 83rd sect. of the Common Law Procedure Act, 1854. It states in substance that the defendants only guaranteed that goods should be shipped at such a rate of freight per ton, that if the ship were fully loaded she would earn 5500*l.*; that the contract was reduced into writing in Spanish by one of the defendants, who was imperfectly acquainted with that language, and that by mistake it was drawn up as an absolute

contract to procure a cargo rendering not less freight than 5500*l*. [*Alderson*, B.—Does not the plea amount to this, that the contract which the parties really made is different from the contract declared on; if so, is not the objection open under the general issue?] The contract having been reduced to writing, evidence is inadmissible to vary its terms. [*Martin*, B.—The defendants should apply to a Court of equity to reform the agreement.] In *Steele v. Haddock* (a), which was an action of trover for goods, the defendant was allowed to plead an equitable defence, that the plaintiff was the owner of certain chemical works; that the goods in question were stock in trade and materials on the premises; that the defendants agreed to purchase the chemical works from the plaintiff, and the goods in question were to be included in the property sold; that by mistake of the brokers who were employed to make the contract, the bought and sold notes were so worded as not to include the stock in trade and materials, which were intended to be included both by the plaintiff and defendant; that possession of the chemical works, including the goods in question, had been delivered by the plaintiff to the defendant and the purchase completed; and that the plaintiff was unjustly availing himself of what was a mere mistake in the wording of the notes. [*Alderson*, B.—That case is different from the present, for there the agreement was *executed*. The plaintiff had delivered the goods to the defendant under the contract, but he sought to recover them back, because he had delivered them under a contract which did not convey them; the answer however was, “you have contracted to deliver them.” It is as if, in this case, the defendants had been sued for not delivering goods, and they had set up this defence as to a mistake in reducing the contract into writing. Here the contract is executory only.] The defendants have performed all that they really undertook, so that the contract is in fact executed.

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(a) 10 Exch. 643.

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Brown shewed cause in the first instance.—This plea ought not to be allowed. A Court of equity never grants relief in such cases, except upon the clearest and most satisfactory evidence.

Cur. adv. vult.

ALDERSON, B., now said—An application was made yesterday by Mr. *Burnie*, in an action of contract, to be allowed to plead a defence on equitable grounds. The subject of the proposed defence was, that although the defendants had signed a contract in certain terms, yet that by mistake of the person who had reduced it into writing in the Spanish language, and who imperfectly understood that language, it did not express the real contract between the parties, and therefore the defendants would be entitled to relief in a Court of equity. We have had an opportunity of reading the plea, and are of opinion that it ought not to be allowed. It is doubtful whether the subject matter of the proposed plea would not be a good defence under a plea denying the contract. It may be so,—but even if it would not, we are of opinion that we ought not to allow the plea for the purpose of determining in this Court a question which can only be properly determined in a Court of equity. If the defendants have equitable ground for reforming the contract, they should apply to a Court of equity, where they would be answered by the statement of the plaintiffs, and the question would be raised upon hearing the evidence on both sides, and the Court might perhaps direct an issue. How can that question be raised by plea in a Court of law? This is not the case of an *executed* contract, as in *Steele v. Haddock*, but the plea is set up as an equitable defence to an *executory* contract, and therefore the question whether it is to be performed depends upon our determining an equitable issue, which we have no power to do. We therefore think that the plea ought not to be allowed.

Rule refused (a).

(a) See *Wood v. Dwarries*, ante, p. 493.

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KELSALL, Administrator of W. KELSALL, *v.* TYLER and
Others.

Jan. 23.

THIS was an action to recover 1000*l.* and interest from the 30th September, 1854. By consent of the parties and order of a Judge, according to the Common Law Procedure Act, 1852, the following case was stated for the opinion of this Court without pleadings:—

The plaintiff is administrator of the goods, chattels, and effects of William Kelsall, deceased. The defendants are three of the directors of the “United Kingdom Temperance and General Provident Institution,” which was duly enrolled and established under and according to the provisions of the statute 10 Geo. 4, c. 56, and 4 & 5 Will. 4, c. 40, on the 31st December, 1840; and from the time of its having been so enrolled and established, has been and still is subject to and entitled to the benefit of those statutes, and all other statutes in force concerning Friendly Societies, so far as such last-mentioned statutes were and are applicable to friendly societies so enrolled and established. On the 26th September, 1851, the said William Kelsall effected a policy of assurance with the said institution for 1000*l.* upon his life, in pursuance of a previous proposal and declaration in writing signed by him; and the policy was then signed by the defendants, as three of the directors of the said institution.

The policy was as follows:—“Whereas William Kelsall, of Ludbrook-park, Surrey, merchant, is desirous of effecting an assurance with the “United Kingdom Temperance and General Provident Institution” for the sum of one thousand pounds, to be paid at his death, and hath signed and caused to be delivered into the office of the said institution a proposal and declaration in writing, bearing date

A claim by an administrator on a policy of life assurance, granted to the intestate by a society enrolled under the Friendly Societies Acts, 10 Geo. 4, c. 56, and 4 & 5 Will. 4, c. 40, is not “a dispute between the society and a member, or a person claiming on account of a member,” within the meaning of the 27th section of the 10 Geo. 4, c. 56, which requires such disputes to be determined by arbitration.

A society enrolled under the 10 Geo. 4, c. 56, and 4 & 5 Will. 4, c. 40, cannot legally grant assurances on lives, notwithstanding rules authorising them to do so have been certified and allowed.

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22nd September, 1851, declaring (amongst other things), that the age of the said William Kelsall, next birthday, would not exceed forty-four years, and that the statement subjoined thereto of health and of circumstances, if any, likely to affect it, was fully and faithfully made. And the said proposer did thereby agree that such declaration should be the basis between him and "The United Kingdom Temperance and General Provident Institution," and that if any untrue averment was contained in that declaration, as respected age, state of health, or circumstances, then all monies which might have been paid on account of the said assurance should be forfeited, and the contract between him and the said institution should be null and void: And whereas the said proposer hath paid to the said institution the sum of 36*l.* 10*s.* 10*d.* as the premium for the assurance above mentioned, for the period commencing this day and terminating on the 30th September, 1852, both inclusive: Now therefore this policy witnesseth, that we, three of the directors of the said institution whose names are hereunto subscribed, do hereby agree, that in case the said William Kelsall shall die at any time on or before the 30th September, 1852, or if he shall survive that day, and the said proposer shall on or before the 1st October, 1852, and on the same day in every subsequent year during which he shall be living, pay or cause to be paid to the said institution the premium of 36*l.* 10*s.* 10*d.*, the funds of the said institution shall, conformably to the rules and regulations thereof, and subject to the proviso next hereinafter contained concerning the same, be liable to pay, within six calendar months from the day on which notice in writing shall have been received of the decease of the said William Kelsall (accompanied by satisfactory evidence thereof), unto the executors, administrators, or assigns of the said William Kelsall, the sum of 1000*l.* sterling, together with such other sum or sums, if any, as shall under the rules and regulations of the said institution be appropriated to the

increase of the sum hereby assured: Provided always, that the sum hereby assured and all other money (if any) payable hereunder, or any part or parts thereof respectively, may be payable to the person or persons (not being any other than the widow or child of the said William Kelsall), and in the shares and manner to whom and in which the said William Kelsall shall, by memorandum or memoranda indorsed hereon, purporting to be signed by him, from time to time direct the same respectively to be paid, so that the relationship of such person or persons to the said William Kelsall be stated in such memorandum or memoranda, which statement shall be taken as conclusive evidence, in favour of the said institution, of such person or persons being the wife, child, or children of the said William Kelsall, as the case may be; and so that the said institution shall make payment of the said sum hereby assured, and all other money payable hereunder (if any) according to the purport of such indorsement or indorsements as aforesaid (if any), so far as the same shall respectively appear uncanceled hereon, and in order of priority, according as such indorsements (if more than one) appear or purport to have been respectively made: Provided further, that if the said proposer shall have mis-stated or suppressed any material circumstances affecting his health or probability of living to old age, the directors of this institution shall, at their option, either continue this assurance at such additional charge or rate of premium as they may consider equivalent to the risk incurred by such mis-statement or suppression as aforesaid, or refund the premiums which shall have been paid, and cancel the assurance hereby effected: Provided further, that if it should be proved the said proposer and his referees, or any of them, have knowingly given false testimonials, this policy shall be null and void, and all premiums and other monies paid in respect thereof shall be forfeited to the institution: Provided further, that this policy and the assurance hereby effected are and shall be

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subject and liable to the several conditions, rules, and regulations hereupon indorsed, and to the rules and regulations of the said institution, so far as the same are or shall be applicable, in the same manner as if the same respectively were repeated and incorporated in this policy: Provided lastly, that the funds of the said institution (subject to prior claims and demands) shall alone be liable to answer and to make good all claims and demands in respect of this policy; and neither the directors executing this policy, nor any of them, nor any other director or other officer of the said institution, nor their respective executors or administrators, shall be individually subject or liable to any action, suit, claim, or demand whatsoever in respect of this policy (except so far as such director or other officer may have made himself answerable or responsible under the provisions of the Act 10 Geo. 4, c. 56, as amended by 4 & 5 Will. 4, c. 40); and that no other member of the said institution, nor any other person, shall be subject or liable to any action, suit, claim, or demand whatsoever in respect of this policy. In witness whereof, We, three of the directors of the said institution, have hereunto set our hands in London, this 26th day of September, A. D. 1851."

The following indorsements were on the policy:—

UNITED KINGDOM TEMPERANCE AND GENERAL PROVIDENT INSTITUTION.

This institution is established under the provisions of the Act 10 Geo. 4, c. 56, intituled "An Act to consolidate and amend the Laws relating to Friendly Societies," as amended by 4 & 5 Will. 4, c. 40, and 3 & 4 Vict. c. 73, and was enrolled on the 31st of December, 1840, as the United Kingdom Total Abstinence Life Association.

A copy of the rules and regulations of the Institution has, conformably to the above-mentioned Act, been deposited with the Clerk of the Peace for the City of London, and has been filed by him with the Rolls of the Sessions of the Peace in his custody.

The directors are empowered to alter and amend the rules, subject to the confirmation of a General Meeting of Members; and when approved by the Barrister appointed to certify the Rules of Friendly Societies,

and enrolled pursuant to the Act, the rules so altered are binding upon all the members.

The institution is supported by the Premiums paid by the members for their assurances.

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CONDITIONS OF ASSURANCE.

All assurers shall be deemed and taken to have notice of the rules and regulations of the institution.

Every assurance is subject to all the rules applicable thereto. If the premium for this assurance shall be in arrear for more than thirty days from the time of its becoming due, the policy shall be null and void, subject to renewal within twelve months, according to the terms stated in the rules.

The within policy will become void, if the person on whose life the assurance is effected shall die in consequence of any of the following circumstances:—

1st. Being on the high seas, otherwise than as a passenger from one part of the United Kingdom to another, or as a passenger on board a decked vessel between the Elbe and the port of Gibraltar in time of peace, unless permission shall have been obtained from the Board of Directors, and such additional premium paid as they require.

2nd. Going beyond the limits of Europe, unless with such permission, and on payment of such additional premium as the Board of Directors shall require.

3rd. By suicide (whether felonious or the result of insanity), or by duelling.

4th. And whenever any assurance shall have become void as aforesaid, then, at the discretion of the Board, either the value of the assurance on the day before it shall have become void, or such portion as the directors may think fit, or all the premiums received upon it without interest thereon, shall be paid in such manner as the sum assured would have been paid had it been due.

5th. If any member shall be convicted of felony, or shall by any artful, false, or fraudulent representation, obtain or attempt to obtain any allowance, benefit, or money from the funds of this institution, he or she shall be excluded from this institution, and all his or her interests and monies therein shall be forfeited.

7th. If any person whose life is assured in this institution shall be called into actual service in the army or navy, or shall voluntarily enter thereinto, or if he shall be killed in actual warfare, then, in every such case, all assurances effected on the life of such person shall be null and void; but either the value of the assurance on the day before it shall so have become void, or, at the discretion of the Board, the amount of the premiums paid thereon, without interest,

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shall be returned to the assured, his executors, administrators, or assigns.

8th. No assignment of any benefit assured by this institution, or of any policy relating thereto, shall be valid and effectual, unless written notice of such assignment or of an intention to make the same shall have been given to this institution at or before the time of making the same, accompanied by a copy or written statement, signed by the parties making and claiming under such assignment, of the indorsements (if any) then appearing on such policy, or so much thereof as may be then uncanceled, or the true purport of such indorsements; and such notice and copy or statement (if any) shall be registered in the books of this institution, and shall be sufficient evidence in favour of this institution, and the directors and trustees for the time being thereof, of the correctness of the matters therein respectively stated.

A copy of the rules and regulations of the said institution are annexed to this case (a), and are agreed to be con-

(a) The following were referred to in the course of the argument:—

“RULES.

“I. The object of this institution is, to raise by subscription amongst the members thereof a fund for the mutual benefit, relief, and maintenance of such members, their wives, children, relations, and nominees.

“II. ASSURANCES TO BE EFFECTED.

“Department 1.—An assurance of a sum of money payable at the death of the assured to his or her executors, or to any surviving nominee or nominees.

“Department 2.—An assurance as in the former case, but with the provision, that, if the assured shall attain an age agreed, the amount assured shall be paid to himself on attaining that age, instead of being paid at his decease. The members

of the departments Nos. 1 and 2 are required to abstain from all intoxicating beverages, or pay an extra premium.

“Department 3.—An assurance of a sum of money to be paid to the member, or other person named in the policy, on attaining to a specified age.

“Department 4.—An assurance of a sum of money payable as in department 3, or at the end of any number of years. The premiums paid in this department to be *returned* in case the assured shall die before the sum assured becomes due.

“Depositors to be furnished with deposit-books, as in the savings banks.

“Department 5.—An assurance of an annuity on one or more lives, the first payment to be due six months after the purchase is completed, and to be paid every half-year on the 15th

sidered as part thereof. The said rules and regulations were duly certified, enrolled, allowed, and confirmed ac-

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day of February and August, or of May and November, in each and every year during the life of the annuitant or annuitants.

"Department 6.—An assurance of an annuity, payable as aforesaid, to commence when the party assured shall attain a given age.

"Department 7.—An assurance of an annuity, as in the last department, but with the provision that the premiums paid shall be returned (without interest) in the event of the party dying before the age fixed for the annuity to commence.

"Department 8.—An assurance of an annuity, to be paid every half-year during the life of a widow, child, or other person, after the member's decease.

"Department 9.—An assurance as in department 1, but without the condition of abstinence from intoxicating liquors.

"Department 10.—Assurance on joint lives."

"XIV. RESPONSIBILITIES AND SECURITIES.

"The trustees, directors, or any other officer of this institution shall not be liable to make good any deficiency which may arise in the funds thereof, unless such persons shall have respectively declared by writing under their hands, deposited and registered in like manner with the rules of this institution, that

they are willing so to be answerable; and that it shall be lawful for each of such persons, or for such persons collectively, to limit his, her, or their responsibility to such sum as shall be specified in any such instrument or writing; provided always, that the said trustees and every other officer shall be responsible and liable for all monies actually received by them or him on account of, or for the use of, this institution; and that every such trustee, or other officer (if required so to do by a board of directors), shall give such security, according to the form prescribed in the schedule to the Act relating to Friendly Societies, as by such board of directors shall be thought expedient."

"XVI. PROPOSAL FOR ASSURANCE.

"Any person desirous of assuring in this institution may tender his or her proposal according to such form as shall be from time to time adopted by the board; and shall in such proposal, or at such other time or times as the board shall require, sign, either by himself or herself, a declaration in such form as the board may from time to time adopt, specifying his or her age, state of health, place of residence, and profession or occupation, and testifying his or her consent or agreement, that every assurance by

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according to the statutes in force concerning friendly societies, and are the rules and regulations of the said institution referred to by the said policy.

him or her effected with this institution shall be subject to all rules and regulations applicable thereto. And on making any such proposal, he or she shall pay such sum, by way of deposit or entrance-money, as shall be from time to time fixed by the board; such deposit or entrance-money to be returned if the proposal be rejected. And when such proposal and declaration shall have been approved by the board, and the premium paid, the candidate shall be enrolled as a member of this institution, and shall be entitled to a copy of the rules and regulations.

"XVII. NOMINEES.

"As regards assurances bearing date *after* the 15th day of August, 1850, any member, instead of permitting the same to devolve upon his or her executors or administrators, may secure the benefits of his or her assurance to his or her widow or widower, or children (as the case may be), in the manner prescribed in such assurance, and may also make a valid assignment of such benefits which, subject to the terms and conditions of such assurance, and to the rules and regulations for the time being of this institution, shall be binding thereon. And every written receipt of the widow, widower, children, and

assigns of such member, or any of them (as the case may be), or of their respective executors or administrators, shall be a valid and effectual discharge for the money which shall therein be acknowledged to be received, and shall exonerate this institution, and the directors and trustees thereof, their heirs, executors, administrators, and successors, from all liability as to the application or non-application of such money: Provided always, that no assignment of any benefit assured by this institution, or of any policy relating thereto, shall be valid and effectual, unless written notice of such assignment, or of an intention to make the same, shall have been given to this institution, at or before the time of making the same, accompanied by a copy or written statement, signed by the parties making and claiming under such assignment, of the indorsements (if any) then appearing on such policy, or so much thereof as may be then uncanceled, or the true purport of such indorsements; and such notice and copy of statement (if any) shall be registered in the books of this institution, and shall be sufficient evidence in favour of this institution, and the directors and trustees for the time being thereof, of the correctness of the matters therein respectively stated."

The annual premiums for the said insurance were duly paid by the said Kelsall, and accepted by the said institu-

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"XXVIII. RENEWAL OF POLICIES IN DEPARTMENTS 1 AND 2.

"Every person whose life is assured in the first or second departments of this institution, on paying a renewal premium on any such assurance, shall furnish a declaration that he or she has abstained from all intoxicating beverages since the last payment, and that he or she will continue to abstain therefrom during the term for which his or her assurance is renewed. And in case of the refusal of such declaration, no assurance shall be renewed without the extra charge specified in the following rule.

"XXIX. FINES IN DEPARTMENTS 1 AND 2.

"If any person whose life is assured in the departments aforesaid shall violate his or her engagement to abstain from alcoholic beverages, he or she shall be required to pay a fine of ten shillings for every 100*l.* so assured. And until such fine is paid, the party shall not participate in any division of the profits of this institution, nor vote at the meetings of members. And if any such person shall continue in the use of alcoholic beverages, or shall refuse to renew his or her engagement to abstain therefrom, when requested to do so by the authorised officers of this institution, he or she shall forfeit all right to at-

tend and vote at the meeting of members, and shall be required to pay an additional premium of fifteen per cent. per annum, or three shillings in the pound on the periodical premiums which may be payable in respect of such assurance or assurances, or (in the case of single premiums) an equivalent fine: Provided, that in case such person shall again wholly renounce the use of alcoholic beverages, and shall prove to the satisfaction of the board that his or her constitution is unimpaired, it shall be lawful for the board to reduce the future premium payable on the assurance to its former amount. But if any such person whose life is assured as aforesaid shall continue in the use of intoxicating liquors, and shall be convicted of *drunkenness*, he or she shall be excluded from this institution, and all his or her interest and monies therein shall be forfeited to the uses thereof. Provided always, that, if it shall appear equitable and expedient to the Board of Directors, it shall be lawful for them either to restore the party excluded (on satisfactory evidence being given of his or her reformation), or to cause such allowance or return to be made to the wife, children, relations, or nominees of such excluded party, as to such directors may appear reasonable and proper: Provided also, nevertheless, that

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tion. On the 13th of May, 1854, the said Kelsall died, and due notice and satisfactory evidence of his death was forthwith given to and received by the assurers, as provided for by the policy; and after the expiration of six calendar months from the time of such notice and proof, the plaintiff, as such administrator, made a written demand of the 1000*l.* insured and interest.

The assurers have declined to pay the amount claimed, and have required the claim to be referred to and decided

nothing contained in any of the rules of this institution shall be so construed as to apply to the use of alcoholic liquors for medicinal or religious purposes; but in all cases where such liquors are or have been medicinally employed, a declaration shall be furnished, stating the complaint and reason for which they have been used, and quantity per diem taken. And on refusal of such declaration (or a written prescription), every person whose life is assured as aforesaid, who shall use alcoholic beverages, under the pretence of their being required for the promotion of health, will be regarded as having violated his or her engagement to abstain therefrom, and will be subjected to the fines and forfeitures aforesaid. The foregoing fines shall apply to the use of all intoxicating liquors, whether distilled or fermented; but to no other department than the first and second."

half of this institution, and any member thereof, or person claiming on account of any such member, shall be referred to and decided by arbitrators appointed in pursuance of the 27th sect. of the 10 Geo. 4, c. 56. And in case of the death or refusal, or neglect, of any or all the said arbitrators to act, the Board of Directors shall, at their next meeting, name and elect one or more arbitrator or arbitrators as aforesaid, to act in the place of the said arbitrator or arbitrators so dying, or refusing or neglecting to act as aforesaid. And in every case of dispute, the names of the said arbitrators shall be written on separate pieces of paper, and put in a box and glass, and the three persons whose names shall be first drawn out by the complaining party, or by some one authorised by him, shall be the arbitrators to decide the matter in difference; and the award made by such arbitrators as aforesaid, or the major part of them, shall be final and conclusive, without any appeal."

"XXXII. ARBITRATORS.

"Every matter in dispute between this institution, or any person acting under or on be-

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by arbitrators, in pursuance of the 27th section of the statute 10 Geo. 4, c. 56, and the 32nd of the rules of the institution.

The question for the opinion of the Court is, whether the provisions relating to arbitration contained in and referred to by the policy, or in the Friendly Societies Acts, are of themselves a sufficient defence to this action? If the Court shall decide that question in the negative, then judgment is to be entered up against the defendants for 1000*l.* and interest, at 5*l.* per cent. per annum, from the 30th day of December, 1854, together with costs. If the Court shall decide that question in the affirmative, then judgment is to be entered up for the defendants for costs.

Tomlinson (Watson with him) for the plaintiff—The plaintiff is not barred from maintaining this action by the provisions relating to arbitration in the policy or Friendly Societies Acts. The instrument in question professes to be a policy of the “United Kingdom Temperance and General Provident Institution,” for the assurance of 1000*l.* on the life of the intestate, at an annual premium; and it is in form the same as an ordinary life policy. It states, however, that the society has been enrolled under the 10 Geo. 4, c. 56, and 4 & 5 Will. 4, c. 40, and that the insurance is effected under “Department I.” (a) of the rules of the society. The 10 Geo. 4, c. 56, s. 2 (b), enables any number of persons to form themselves into a society for the purpose of raising, by subscription, a fund “for the mutual relief and maintenance of all and every the members thereof, their wives or children, or other relations, in sickness, infancy, advanced age, widowhood, or any other natural state or contingency whereof the occurrence is susceptible of calculation by way of average. The 4 & 5 Will. 4, c. 40, s. 2, recites and extends that provision to “nominees” of

(a) Ante, p. 518.

Vict. c. 63, except as to then subsisting societies.

(b) Repealed by the 18 & 19

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members, and it also adds, "or for any other purpose which is not illegal." That means other purpose ejusdem generis as those enumerated: *Regina v. Shortridge* (a). The 3 & 4 Vict. c. 73 (b), s. 1, recites the 10 Geo. 4, c. 56, s. 37, and declares that nothing in that Act contained shall exempt from stamp duty any friendly society, "where the *sum to be assured* to any individual or to any person nominated by, or to claim under him or her, shall exceed the sum of 200*l*." By section 2, no friendly society, by the rules of which such an *assurance* may be effected, shall invest its funds in any savings bank, or with the commissioners for the reduction of the national debt. The terms "sum to be assured" and "assurance" do not mean a sum assured by an ordinary life policy, but the sum to which the wife or children, &c. of a member would be entitled on his death, in proportion to his subscription to the funds of the society. Doubts having been entertained for what purposes a society might be established under the 4 & 5 Will. 4, c. 40, the 9 & 10 Vict. c. 27, s. 1 (c), defined the purposes, the first of which is, "For the lawful insurance of money to be paid on the death of the members to their husbands, wives, or children, kindred or nominees, or for defraying the expenses of the burial of the members, their husbands, wives, or children." By section 7, "Any friendly society, established before the passing of that Act, for any purpose which is thereinbefore specified, or for any legal purpose which shall be certified and allowed as thereinbefore provided, and shall not have been adjudged not to be within the provisions of the 4 & 5 Will. 4, c. 40, by any Court of competent jurisdiction, shall be deemed to have been within the provisions of that Act from the time at which the rules thereof shall have been certified or allowed." The 27th section of the 10 Geo. 4, c. 56, requires that provision

(a) 1 D. & L. 855.

(c) Repealed by the 18 & 19

(b) Repealed by the 18 & 19 Vict. c. 63, except as to then existing societies.

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shall be made by the rules of the society to be confirmed as required by that Act, specifying whether a reference of every "matter in dispute *between any such society, or any person acting under them, and any individual member thereof, or person claiming on account of any member,*" shall be made to justices of the peace for the county in which such society may be formed, or to arbitrators to be appointed in the manner thereafter directed: the Act then provides that not less than three arbitrators shall be chosen by ballot, the number of the arbitrators and the mode of ballot being determined by the rules of the society; and that the decision of the arbitrators shall be final, and may be enforced by order of two justices. The claim on this policy is not a dispute between the society and a member thereof, or a person claiming on account of a member. [*Alderson, B.*—It is certainly not a dispute with a member, for he is dead; neither is it a claim on account of a member, for the plaintiff claims in his own right.] The "persons claiming on account of any member" are those nominated in the policy as the persons to take the benefit of it other than the member himself, such as his wife, children, or nominee. When the 9 & 10 Vict. c. 27, enlarged the purposes of friendly societies, it was seen that in many cases the arbitration clause of the 10 Geo. 4, c. 56, would be inapplicable, and therefore a different mode of settling disputes was provided. By the 15th section of the 9 & 10 Vict. c. 27, where the value of the subject-matter in dispute exceeds 20*l.*, the dispute may, if the parties think fit, be referred in writing to the registrar of friendly societies; but where it does not exceed that amount, it must be so referred. That is a legislative declaration, that a society established for the enlarged purposes mentioned in that Act is not within the provisions of the 27th section of the 10 Geo. 4, c. 56. There are many cases within that enactment: such as disputes between the society and its members as such, with respect to weekly allowance, personal conduct, fines, and

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punishment for misbehaviour, &c. Either the Friendly Societies Acts do not apply to an insurance of this kind, or, if so, the case falls within the 15th section of the 9 & 10 Vict. c. 27.

Kemplay (Hugh Hill with him) for the defendants.—It is conceded that the mere agreement of the parties will not oust this Court of its jurisdiction, and therefore the question must be determined by the Friendly Societies Acts. The policy declares that the directors shall not be liable to any action except so far as they have made themselves responsible under the provisions of the 10 Geo. 4, c. 56, and 4 & 5 Will. 4, c. 40; and looking also at the constitution of the society, it is clear that the liability of the defendant depends on those Acts. The 1st rule (a) defines the object of the society, which is the same as that mentioned in the 10 Geo. 4, c. 56. The 2nd rule (b) provides for assurances to be effected, and enumerates certain specified departments. The 14th rule (c), which relates to the responsibility of trustees and directors, is founded on the 22nd section of the 10 Geo. 4, c. 56. The 32nd rule (d) requires that disputes between the institution and any member, or person claiming on account of a member, shall be decided by arbitrators appointed in pursuance of the 27th section of the 10 Geo. 4, c. 56. The intestate, by effecting this policy, became a member of the society, (rule 16 (e)), and the claim in respect of it is a matter in dispute within the 32nd rule. [*Alderson, B.*—One of the purposes mentioned in the 9 & 10 Vict. c. 27, s. 1, is the making good any loss sustained by the members by shipwreck; but it could never have been intended that arbitrators should have the power of deciding whether a vessel insured was seaworthy.] If this were an insurance under "Department 3 or 4," so that the mem-

(a) *Ante*, p. 518. (b) *Ante*, p. 518. (c) *Ante*, p. 519.
 (d) *Ante*, p. 522. (e) *Ante*, p. 519.

ber himself could sue on the policy, that would be a dispute between the society and a member within the 10 Geo. 4, c. 56, s. 27. [*Alderson*, B.—The reasonable construction of the Act is disputes inter vivos. Suppose a member, who effected an insurance in Department 3 lived for a year after he was entitled to receive the sum assured, and then died, would a claim by his executor be within the 10 Geo. 4, c. 56, s. 27?] There was a similar provision as to arbitration in the Savings Banks Act, 9 Geo. 4, c. 92, s. 45, and that has been held to be compulsory : *Crisp v. Bunbury* (a). This assurance is within the purposes contemplated by the 10 Geo. 4, c. 56, s. 2, as extended by the 4 & 5 Will. 4, c. 40, s. 2. [*Pollock*, C. B.—The 4 & 5 Will. 4, c. 40, does not authorise the insurance of a person's life for a sum of money to be paid to his executors on his death.] The 3 & 4 Vict. c. 73, shews that such an assurance was within the meaning of the previous Acts, for it repeals the privileges of exemption from stamp duty and investment in savings banks, &c., where the "sum assured" by the society to any individual exceeds 200*l*. That Act not only recognises the legality of such assurances, but it provides that societies deprived of those privileges may make rules enabling their members to nominate any person to receive the sum assured: sect. 3. In accordance with that provision the 17th rule (b) was framed. The 9 & 10 Vict. c. 27, removes all doubt; for, amongst other purposes, it mentions the "lawful insurance of money to be paid on the death of a member to his wife, children, or nominees." The term "nominees" includes executors. By the 7th section of the 9 & 10 Vict. c. 27, this institution became a friendly society within the provisions of the 4 & 5 Will. 4, c. 40, from the time its rules were certified and allowed. The plaintiff's construction would render of no avail the 8th section of the 10 Geo. 4, c. 56, which declares that the rules of the society shall be binding on the contributors and their representatives. An executor is a

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(a) 8 Bing. 394.

(b) Ante, p. 520.

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person "claiming on account of a member" within the meaning of the 27th section.—He also referred to Rules 28 (a) and 29 (b).

Tomlinson was not called upon to reply.

POLLOCK, C. B.—I am of opinion that the claim to have this matter disposed of by arbitration cannot prevail. With the exception in the proviso, enabling the assurer, by indorsement on the policy, to make the sum assured payable to his widow or child, this is an ordinary assurance on a man's own life, by which the society promise to pay to his executors 1000*l*. None of the Friendly Societies Acts warrant such an assurance. The first statute is the 10 Geo. 4, c. 56, the 2nd section of which defines the meaning of a "friendly society;" and it is clear that the statute does not contemplate an ordinary assurance by a person on his own life, but only the mutual relief and maintenance of the members of the society and their families in sickness, old age, and infirmity. The next statute is the 4 & 5 Will. 4, c. 40, the 2nd section of which, after reciting the purposes for which such societies were then formed, re-enacts the provisions of the 10 Geo. 4, c. 56, s. 1, and introduces the word or "nominee;" so that not only the wife or child, or relative of a member, might have the benefit, but any person whom he might be desirous of providing for in the event of sickness, &c. The Act then says, "or for any other purpose which is not illegal." Now, it is obvious, that there are many purposes not illegal which are not contemplated by this statute. It is not illegal to trade to the East Indies, to carry on the whale fishery, or to get ore from mines; but such purposes are clearly not within the Act. The words must therefore be construed as "other purposes ejusdem generis;" that is, any other

(a) *Ante*, p. 521.

(b) *Ante*, p. 521

purpose connected with the matter before referred to. The statute then proceeds thus: "Provided always, that when the rules of any society provide for relief in any other case than that of sickness, infancy, advanced age, widowhood, or other natural state or contingency as aforesaid, the contributions for such other purpose shall be kept separate and distinct, or the charges defrayed by extra subscriptions of the members at the time such contingencies take place." That provision shews that the Legislature contemplated the assuring benefits to members, their wives, children, &c., in case of sickness, infancy, &c., and not an ordinary life assurance; for where there is a purpose not illegal, other than those of sickness, infancy, &c., the Legislature provides that it shall be treated as a separate and distinct matter. It does not, however, follow that, because the insurance of lives is not illegal, therefore these societies may grant such insurance. The 3 & 4 Vict. c. 73, first introduced the words "sum assured;" and it is argued that they include every description of assurance. But those words only mean that sum to which a member is entitled with reference to his contribution to the funds of the society. The only circumstances under which he could effect an assurance are those specified in the preceding Acts, 10 Geo. 4, c. 56, and 4 & 5 Will. 4, c. 40; and they never contemplated a mere naked assurance upon a person's life, but only a contribution for the mutual relief and maintenance of the members, their wives, children, relations, or nominees, in sickness, infancy, advanced age, &c. The 9 & 10 Vict. c. 27, speaks of the "insurance of money;" but that means insurance under the authority of the previous Acts; and therefore there is nothing in that statute to justify this society in insuring the life of any person for a sum payable to his executors. No other statute advances the argument; and if the word "insurance" in the 9 & 10 Vict. c. 27, does not mean an ordinary assurance on a person's life, this is not a case within the Friendly Societies Acts.

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But even if it were, I am of opinion that we ought to give the arbitration clause a reasonable construction; and looking also to the language of the 32nd rule, it seems to me that the claim on this policy is not a dispute "between this institution and any member thereof, or person claiming on account of any such member." An executor does not claim on account of a member, but on his own account; and, moreover, when we consider the cases decided in this and other Courts on the subject of insurance—some of them involving questions of the greatest nicety in point of fact, and difficulty in point of law—to suppose that the Legislature meant that a claim on a policy of insurance for 10,000*l.* should be decided by arbitrators chosen by ballot, or two justices, is so absurd, that I cannot for a moment entertain it, or impute to the Legislature that they have so trifled with the important interests of the community. I am of opinion, that, under the statutes, the society has no power to make this sort of assurance; and I doubt whether the circumstance that rules giving them that power have been certified and allowed is of any avail; but, at all events, this is not a case within the 10 Geo. 4, c. 56. Our judgment will therefore be for the plaintiff.

ALDERSON, B.—I am of the same opinion. The question is, whether the institution has a right to have this dispute settled under the provisions of the 10 Geo. 4, c. 56. That statute provides for the determination by arbitrators or justices of any disputes between the society and any *member* thereof, or *person claiming on account of any member*. The 27th section relates to the appointment of arbitrators; and the 28th shews how the justices are to act if the matter is referred to them. It is certainly a startling proposition, that a claim of this nature must be decided by justices or arbitrators chosen at hazard; so that the three first persons whose names may happen to be drawn out of a box are conclusively to decide it, without

any power of appeal. I cannot accede to that proposition, unless the words of the Act clearly shew that such was the meaning of the Legislature. Now, at the time the arbitration clause in the 10 Geo. 4, c. 56, was framed, there was no assurance of this kind by a member of a friendly society; and the only disputes between the society and its members, or persons claiming on account of members, were disputes as to their maintenance during sickness, incapacity to work, old age, &c., or, when death occurred, as to the burial of the deceased. Those are very proper disputes to be determined by the order of justices or arbitrators, because that is a cheap process in simple matters: though it is to be observed, that no power to examine witnesses is given to the justices or arbitrators. But to apply that to a claim on a policy of assurance for 10,000*l.*, involving, perhaps, the most difficult questions of law and fact, is so absurd, that I cannot for a moment imagine that the Legislature ever intended it. The very absurdity of it is a reason why we should construe the Act literally; and if it be so construed, it does not apply to this case, because there is no dispute with a member, for he is dead, and so the plaintiff cannot be a person claiming on account of a member. That is the literal construction and ordinary meaning of the words. Then, why should we construe the Act literally in order to create an absurdity? Here is a dispute between the society on the one hand, and the executor of a member on the other, as to a large sum of money due on a policy of assurance; and if that were within the arbitration clause, how are the arbitrators to make their award? The form of award given in the schedule of the 10 Geo. 4, c. 56, does not recite that there was a dispute about a policy of insurance, but it merely says that the major part of the arbitrators do award and order that A. B. do, on a certain day, pay to C. D. the sum of &c., "or, we do hereby reinstate in, or expel A. B. from, the said society." That shews the nature of the disputes which were

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intended to be decided by arbitrators, and that other contracts of the society were to be determined in the way in which the law of the land requires them.

PLATT, B.—I am of the same opinion. The question is, whether this is such a contract as was intended by the Legislature to be decided by arbitrators. The original formation of these societies was for the relief and maintenance of members and their families in sickness, old age, and infirmity; and by payment of a weekly or other sum they became entitled to assistance. There is no provision in the 10 Geo. 4, c. 56, with respect to the insurance of a sum payable on the death of a member. But the 4 & 5 Will 4, c. 40, introduced another state of things. The 2nd section of that Act provides, that in addition to the purposes for which these societies may be formed under the 10 Geo. 4, c. 56, they may be formed "for any other purpose which is not illegal." That enabled a member to provide for a payment to his widow upon the contingency of death. But in that case the statute requires that "the contributions shall be kept separate and distinct, or the charges defrayed by extra subscriptions of the members at the time such contingencies take place." There is good reason for that provision, for one person might have been a member of the society for fifty or sixty years, and another for four or five years only, and it would be but just that a different sum should be payable on the contingency of their deaths, inasmuch as the society deserved greater profits from the one than the other. That was to them in one sense an insurance, because the money which they paid was like a premium paid on an ordinary life insurance. Doubtless, a question arose whether persons who thus became entitled to a large sum of money, should enjoy the exemption from stamp duty which was granted to these societies, as being composed of the poorer classes. Then came the 3 & 4 Vict. c. 73, which provides that the exemption shall not extend

to any friendly society "where the *sum to be assured* to any individual" shall exceed 200*l.* No doubt the introduction of those words led to these societies carrying on the business of ordinary life assurance. The 9 & 10 Vict. c. 27, was passed in order to define the purposes for which these societies might be established. The 1st section recites, that doubts had been entertained on that subject, and it then proceeds to enumerate the purposes, the first of which is "For the lawful insurance of money to be paid on the death of the members to their husbands, wives, or children, kindred or *nominees*." It has been contended that the word "*nominees*" includes executors; but it means persons named as distinguished from executors; and in my opinion the word has been advisedly inserted in the section in order to exclude an insurance of this kind. If the deceased had nominated another person, I doubt whether that person could have maintained an action on the policy. It is certainly a startling proposition, that a claim on a policy of assurance for 1000*l.* must be decided by compulsory arbitration, the arbitrators being chosen by ballot; but in truth the amount is immaterial, for an assurance of this kind was never contemplated by the legislature.

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MARTIN, B.—I am of the same opinion. It seems to me that the case is free from doubt. The question is, whether the claim upon this document must be decided by arbitrators, or whether the party seeking to enforce it may resort to the ordinary tribunals of the country. The document is in the form of a policy of assurance, and in truth it is nothing more or less than a common life policy. It begins by reciting that the intestate was desirous of effecting an assurance with this institution for the sum of 1000*l.*; that he had delivered to the office of the institution a proposal and declaration in writing as to his age, &c.; and that he agreed that such declaration should be the basis of the contract between him and the institution; and that

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if any untrue statement was contained in it, the contract should be void. That is the introductory statement in every common life policy. Then, after reciting that the proposer had paid to the institution the premium for the assurance for one year, it is witnessed that the directors whose names are thereunto subscribed agree that in case the assurer shall die before a certain day, or if he shall survive that day, and pay the yearly premium, "the funds of the institution shall, conformably to the rules and regulations thereof, and subject to the proviso next thereafter contained," be liable to pay, within three months after notice of the decease of the assurer, to his executors, administrators, or assigns, 1000*l*. The next proviso is, that the sum assured may, by indorsement on the policy, be made payable to the widow or child of the assurer, and thus they would get the money free from probate duty or legacy duty. It would seem that the object of this society is to carry on the business of an ordinary insurance office under the disguise of a friendly society, and so enable persons to avoid the payment of duty. The policy then provides for misstatements, &c. Then there is a provision that the assurance shall be liable to the conditions indorsed on the policy, "and to the other rules and regulations of the said institution, so far as the same shall or may be applicable." It lastly provides, that the funds of the institution shall alone be liable to make good all claims in respect of the policy, and that no director shall be liable to any action, suit, or demand, except so far as he is responsible under the 10 Geo. 4, c. 56, and 4 & 5 Will. 4, c. 40. It has been properly conceded, that, unless this contract is within those Acts, a provision of that kind is of no avail; for the law will not permit a person who enters into a binding contract, to say in another clause that he will not be liable to be sued for a breach of it. It is also clear, that, although the sum assured is declared to be payable out of the funds of the society, yet, according to the construction which such a clause has re-

ceived in Courts of law, an action will lie against the directors to recover it, and it is for them to make out that the society has no funds. With respect to the clause enabling the assurer to appoint payment of the sum assured to his wife or child, in my opinion, that clause is wholly inoperative. No action could be maintained by the wife or child, but only by the executor; for the law will not permit the fiscal dues of the country to be evaded, by changing a contract with the assurer into one with his wife or child. Then with respect to the indorsements on the policy, it is stated that the institution is established under the 6 Geo. 4, c. 56, and that a copy of the rules and regulations has been deposited with the clerk of the peace for the city of London. Under the head "Conditions of Assurance," it is stated that "all assurers shall be deemed and taken to have notice of the rules and regulations of the institution," and that "every assurance is subject to all the rules and regulations applicable thereto." Then follow other conditions which are found on every ordinary life policy. The law of England does not regard the name by which a document is called, but what it really is; and this is an ordinary life policy. The first Act relating to the question is the 10 Geo. 4, c. 56, intituled "An Act to consolidate and amend the Laws relating to Friendly Societies." The 2nd section recites, that certain friendly societies have been established for raising by voluntary subscription of the members thereof separate funds for the mutual relief and maintenance of the said members in sickness, old age, and infirmity, and it is expedient to give protection to such societies and the funds thereby established, and to form encouragement to other persons to form the like societies." It then proceeds to give considerable protection and encouragement to such societies, and, amongst other benefits, it exempts them from stamp duty, and enables them to invest their funds in the savings banks, and with the commissioners for the reduction of the national debt. It is obvious that the object of

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the legislature was to enable persons in a humble rank of life to provide for the maintenance of themselves and their families in sickness, old age, or infirmity. Then is there the slightest ground for supposing that this institution is of that character? The rules indeed commence by stating that "the object of this institution is to raise by subscription, amongst the members thereof, a fund for the mutual benefit, relief, and maintenance of such members, their wives, children, relations, and nominees;" and no doubt, if that were so, it would be within the Friendly Societies Acts. But rule 2 is headed "Assurances to be effected," and "Department 1" is "An assurance of a sum of money payable at the death of the assured, to his or her executors, or to any surviving nominee or nominees." What is that but a common and ordinary life policy? Then "Department 2,"—"An assurance as in the former case, but with the provision, that if the assured shall attain to an age agreed on, the amount assured shall be paid to himself on attaining that age, instead of being paid at his decease." There is scarcely a single prospectus of a life insurance office which does not state the same thing. Then the rule goes on to say, "The members of Departments 1 and 2 are required to abstain from all intoxicating beverages, or pay an extra premium." That is merely furnishing an insurance for a particular class of persons, just as there are insurance offices for members of the universities, or the law, &c. Departments 9 and 10 are the same insurances as 1 and 2, but without the condition of abstinence from intoxicating liquors. "Department 4" is "An assurance of a sum of money payable as in Department 3, or at the end of any number of years." Departments 5, 6, 7, and 8 are the common assurance of an annuity. Therefore the business transacted by this society is nothing more or less than that of an ordinary insurance office, and altogether unlike that of a society established for the purpose of affording relief and maintenance to its members in sickness, old age, or

infirmity. But the case does not rest there. The 10 Geo. 4, c. 56, s. 34, requires a return to be made to the clerk of the peace, in the form prescribed by the schedule, of the sickness and mortality of the members for the five years preceding; and can it be said, that such a return applies to a common and ordinary life insurance office? Then again, look at the form of the award in the schedule of the 10 Geo. 4, c. 56. That is a most proper form of award where the question is, whether a member is entitled to 5s. a week; or whether he is to be reinstated in or expelled from the society: but it would be absurd to apply it to such an insurance as this. The 27th section of the 10 Geo. 4, c. 56, makes no provision for costs; and it could never have been intended that a claim on a policy for 10,000*l.* should be decided by arbitrators, who have no power to give costs. It is an abuse of language to say that such a claim is within that Act. The 4 & 5 Will. 4, c. 40, s. 2, defines the purposes for which friendly societies may be established in precisely the same manner as the 10 Geo. 4, c. 56, and adds, "or for any other purpose which is not illegal." *Regina v. Shortridge* (a) is an express authority that that means purposes of a similar kind. The 3 & 4 Vict. c. 73, was obviously passed because the legislature found that these societies abused their privilege of exemption from stamp duty. The 9 & 10 Vict. c. 27, is still relied on, but in my opinion the 15th section of that Act puts an end to the claim to have this matter submitted to arbitration. The term "insurance of money" does not mean money to be paid, under a common policy of insurance, to the executors of the assured, but money to be paid on the death of a member to his wife, children, or nominee, or for his burial. That is an insurance in one sense, though, perhaps, the term is incorrectly used; but it only means such an insurance as the previous statutes authorised these societies to grant. Then

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(a) 1 D. & L. 855.

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it is said, that, by the 7th section of the 9 & 10 Vict. c. 27, this institution became a friendly society within the provisions of the 4 & 5 Will. 4, c. 46, from the time its rules were certified and allowed. No doubt it would if it had been within the provisions of the 10 Geo. 4, c. 56; but, because it has obtained a certificate from a person who, under the circumstances, had no judicial power to grant one, it cannot legally obtain the benefit of carrying on the business of an ordinary life insurance office. For these reasons, I am of opinion that this is not a friendly society within the meaning of those Acts; and that, even if it were, a contract of this kind was never intended by the legislature to be submitted to arbitration.

Judgment for the plaintiff (a).

(a) See the 17 & 18 Vict. c. 56, and 18 & 19 Vict. c. 63.

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JOB v. LAMB.

Jan. 15.

DECLARATION for money payable by the defendant to the plaintiff for the defendant's use, by the plaintiff's permission, of rooms and chambers in and parcel of a certain messuage of the plaintiff.

Plea.—That, before and at the time of making the contract on which the plaintiff's claim arises, the defendant was then a promoter of a joint stock company intended to be established in England for the purpose of insurance on lives, the capital stock of which was agreed to be divided into shares, so as to be transferable without the express consent of all the copartners, and which at its formation, or by subsequent admission (otherwise than by admission subsequent, by dissolution, or other act of law), consisted of more than twenty-five members, the formation of which company commenced after the 1st of November, 1854, and which was not for erecting a bridge or other works mentioned in the statute in such case made, which could not be carried into execution without obtaining the authority of Parliament, and which was not incorporated or intended to be incorporated by statute or charter, or authorised or intended to be authorised by statute or letters patent, to sue or to be sued in the name of any officer or person, which proposed company then was a joint stock company within the true intent and meaning of the statute (8 & 9 Vict. c. 110), and to which the provisions of the said Act, particularly the provision contained in sect. 23 of the said Act, were applicable. That, after the provisional registration of the company had been certified by the register of joint stock companies, and within twelve months from the date of such certificate, and whilst the company was pro-

The 7 & 8 Vict. c. 110, s. 23, which prohibits the promoters of a joint stock company provisionally registered from (inter alia) contracting for or holding land, &c., except the contract be made conditional on the completion of the company, and to take effect after the certificate of complete registration, only applies to contracts made by the directors as such on behalf of the company; and, therefore, where the plaintiff agreed to let to the defendant, and the defendant agreed to take certain premises at a yearly rent:—*Held*, that the contract was valid, notwithstanding the defendant was a director of a joint stock company provisionally registered, and the premises were taken by him for the

use of, and were occupied by, the company.

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visionally registered, and whilst the promoters of the company were empowered by the company to act provisionally, and before the company had obtained a certificate of complete registration, the defendant as such promoter, and for and on behalf of the said company, *illegally and contrary to the statute in such case made*, contracted with the plaintiff for the use of the said rooms and chambers, and that the defendant as such promoter, and for and on behalf of the company, should hold the said rooms and chambers (the same being lands), which contract was not for any thing necessarily required for the establishing of the company, nor was it a contract made conditional on the completion of the company, or to take effect after a certificate of complete registration, Act of Parliament, or charter, or letters patent should have been obtained.—Averments.—That the plaintiff had notice of the premises at the time of the making of the contract; and that the use of the rooms and chambers in the declaration mentioned was the use of the same under the said illegal contract; and that the permission of the plaintiff in the declaration mentioned was given by such illegal contract.

Replication.—The plaintiff joins issue upon the plea.

At the trial, before *Martin*, B., at the London Sitting after last Michaelmas Term, it appeared that the action was brought to recover the sum of 271*l.* 9*s.*, for the rent of premises let by the plaintiff to the defendant under the following circumstances—The defendant was a director of a company provisionally registered under the 8 & 9 Vict. c. 110, called “The General Indemnity Insurance Company.” The company having advertised for offices for the purposes of their business, a correspondence took place between the directors and the plaintiff, who was desirous of letting a part of his house in Cannon-street, when an agreement was entered into (so far as material) as follows:—

“Memorandum of agreement, made the 23rd of January, 1854, between Alfred Job, of &c. (the plaintiff), of the one

part, and H. Lamb, of &c. (the defendant), J. Muschamp, of &c., J. Ferguson, of &c., and E. Tomlinson, of &c., of the other part. The said A. Job agrees to let, and the said H. Lamb, J. Muschamp, H. Ferguson, and E. Tomlinson, jointly and severally agree to rent and take, so many of the rooms contained or comprised on the basement and ground floor of the messuage and premises of A. Job, situate &c., as are particularly shewn on a plan hereunto annexed, for the term of three years from the 25th of March, 1854, at the yearly rental of 320*l.*, payable quarterly," &c.

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The company occupied the premises under the agreement until the 29th of September, 1855. Evidence was adduced to shew that the premises were not such as were necessarily required for the establishment of the company.

It was submitted, on the part of the defendant, that this was a contract entered into by the directors of a company provisionally registered, in contravention of the 7 & 8 Vict. c. 110, s. 23, and therefore void. *Bull v. Chapman* (a) was referred to. The learned Judge was of opinion that this was not a case within the statute, and a verdict was found for the plaintiff for 271*l.*, leave being reserved to the defendant to enter a verdict for him.

Prentice now moved accordingly.—The defendant is entitled to have the verdict entered for him. The 7 & 8 Vict. c. 110, s. 23, prohibits the promoters of a joint stock company provisionally registered from contracting for or holding land, except the contract be made conditional on the completion of the company, and to take effect after the certificate of complete registration. *Bull v. Chapman* (a) is an express authority that contracts entered into in contravention of that enactment are illegal and void. [*Martin*, B.—That case has no application. Here

(a) 8 Exch. 444.

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there is a written agreement, by which the defendant agreed to take the premises and pay a certain rent for them, and the plaintiff agreed to let them to him on those terms. Suppose a promoter of a provisionally registered company went to the owner of certain premises and told him that the company would soon be completely registered, and that they were desirous of renting his premises, would it not be competent for the owner to say "I will have nothing to do with the company, but I am willing to accept you as a tenant?" Then, if the parties afterwards signed an agreement, could the tenant, as soon as the rent became due, turn round and say "I am not bound to pay any rent, although I have agreed to do so, because, at the time I entered into the agreement, I was a promoter of a company provisionally registered, and I took the premises for the purpose of carrying on the business of the company?"] In *Bull v. Chapman* (a), Parke, B., in delivering the judgment of the Court, says, "If such acts are not absolutely prohibited, the plea would amount to the general issue; because it would mean simply that the defendants had no authority to bind their principals to the contract mentioned in that plea. But if, on the other hand, the acts are positively prohibited by this statute, the contract would be illegal and void, and the plea would not be open to the objection of amounting to the general issue. On reference to the language of the 23rd section, and adopting the ordinary rule of construction, we are of opinion that the Act makes the contract illegal." [Alderson, B.—The word "illegal" does not mean illegal in all respects, but only as binding the company. The enactment was intended to protect persons who should afterwards become members of the company from the acts of the provisional committee; and as against such persons the acts prohibited by the statute are illegal and void.] The defendant is, at all

(a) 8 Exch. 444.

events, entitled to the verdict, since the plea was, in point of fact, proved; and if it is bad in law, the plaintiff can move for judgment non obstante veredicto. [*Martin, B.*—It was not proved that the contract was illegal.]

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ALDERSON, B.—The plea was not proved; nor is it a good plea. The 7 & 8 Vict. c. 110, s. 23, applies only to contracts by the provisional directors *as such*.

PLATT, B., and MARTIN, B., concurred.

Rule refused.

FLITCROFT and Others v. FLETCHER.

Jan. 24.

THIS was a rule calling on the plaintiffs to shew cause why the defendant should not be at liberty to deliver to them interrogatories, pursuant to the 51st section of the Common Law Procedure Act, 1854.

The 51st section of the Common Law Procedure Act, 1854, which enables the parties to a cause to deliver interrogatories upon any matter as to which discovery may be sought, applies to actions of ejectment.

The rule was obtained on the affidavit of the defendant and his attorney, which stated that the action was ejectment to recover possession of certain messuages, premises, and land situate at Hendon in the county of Middlesex; and that the defendant appeared in respect of the whole of the premises: that the premises were conveyed to the defendant on the 12th of September, 1853, by James Fletcher, who was, as defendant believed, entitled to the same in fee under the will of Henry Flitcroft, deceased, and under a conveyance thereof executed to the said James Fletcher by one Joseph Walmaley, who was, as defendant believed, the heir at law of the said Henry Flitcroft; that, from the time of the death of the said Henry Flitcroft,

Under that section a defendant in ejectment is entitled to interrogate the plaintiff as to the character in which he sues, and the nature of the pedigree on which he relies.

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which took place in the year 1826, the said James Fletcher was in uninterrupted possession of the said premises down to the time of the said conveyance thereof by the said James Fletcher to the defendant, and that since the said conveyance the defendant has been in uninterrupted possession thereof; that, from statements made to deponents by James Flitcroft, one of the plaintiffs, and others, deponents have reason to suppose that the plaintiffs, or some or one of them, claim to be descended from an alleged common ancestor of themselves and of the said Henry Flitcroft, who died upwards of two hundred years ago, but that deponents are wholly ignorant of the mode in which the plaintiffs trace the alleged heirship to the said Henry Flitcroft of themselves, or of the parties from whom they claim, if such be in fact the character in which they claim; and that deponents have no means of inquiring into the same, or of preparing to meet the case which may be set up by the plaintiffs on the trial; that deponents have been advised by counsel and verily believe, that it is necessary and material for the defence of this action that they should obtain discovery of the nature of the case intended to be made on the part of the plaintiffs, and that without such discovery the deponents cannot safely proceed to the trial of this action; that there is a good defence upon the merits, and that the discovery is not sought for the purpose of delay.

The interrogatories proposed to be delivered were as follows:—

1. In what character or in what right do you and each of you claim to be entitled to the possession of the premises claimed by you in this action?

2. Do you, or any of you, claim to be entitled to the same as heir at law of Henry Flitcroft deceased?

3. If so, do you allege that you, or any of you, are his heir at law, and through what links do you trace such heirship?

4. Do you, or any of you, claim to be entitled as grantees from or trustees for any person or persons claiming to be heir at law of the said Henry Flitcroft.

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5. If so, who is or are the person or persons whose grantees or trustees you, or any of you, claim to be? and how do you allege that such person or persons is or are the heir at law of the said Henry Flitcroft; and through what links do you trace such heirship?

6. Have you, or any of you, any right to or interest in the said premises except as aforesaid; and if so, what is the nature of such right or interest?

A similar application had been made to *Crowder, J.*, at Chambers, who referred the matter to the Court.

Sir *F. Thesiger*, *Lush*, and *Brandt* shewed cause.—First, the provisions of the 51st section of the Common Law Procedure Act, 1854, do not apply to the action of ejectment. That section enacts, that “In all causes in any of the superior Courts, by order of the Court or a Judge, the plaintiff may with the declaration, and the defendant may with the plea, or either of them by leave of the Court or a Judge may at any other time, deliver to the opposite party or his attorney, &c. interrogatories in writing upon any matter as to which discovery may be sought,” &c. That imports a form of action in which there is both a declaration and plea. The 83rd section enables a defendant to plead an equitable defence “*in any case* in any of the superior Courts,” &c., and yet it has been held that such a defence cannot be pleaded in ejectment, there being no plea in that form of action: *Neave v. Avery* (a). The time for delivering the interrogatories has reference to the different stages in an action, and cannot apply to ejectment, in which the only step taken by the defendant is to appear to the writ and defend.

(a) 16 C. B. 328.

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Secondly, assuming that the 51st section of the Common Law Procedure Act, 1854, applies to actions of ejectment, the question is, to what extent is the defendant entitled to a discovery? Now, in a Court of equity, the defendant would have a right to know in what character the plaintiff sues, whether as heir or otherwise; but not to know the pedigree of the plaintiff, much less the manner in which he intends to establish it. In *Wigram on Discovery*, sect. 372, it is said, "Lord *Redesdale*, however, in speaking of the purposes for which discovery is given, says, the plaintiff may require a discovery of the case on which the defendant relies, *and of the manner in which he intends to support it (a)*. The first of these propositions—that a plaintiff is entitled to a discovery of the case on which the defendant relies, that is, that the plaintiff is entitled to *know what the case is*—admits of no doubt . . . The second part of the above quotation from Lord *Redesdale*, namely, that the plaintiff has a right to know *in what manner the defendant intends to support his case*, must (it is conceived) be an *inaccuracy*. It is decidedly opposed to all the authorities." [*Alderson, B.*—Formerly, in all real actions brought by an heir on the seisin of his ancestor, it was not enough to say that he was heir to such a one generally, but he was bound to set forth specially in what manner and how he was heir.] The reason of that rule, no doubt, was that a party who had been in possession for sixty or thirty years, (which were the periods of limitation in writs of right and formedon,) ought not to be disturbed unless the demandant shewed title. The defendant will rely on *Metcalf v. Hervey (b)*, where Lord *Hardwicke* said, "The question comes to this, whether any person in possession of an estate, as tenant or otherwise, may not bring a bill to discover the title of a person bringing an ejectment against him, to have it set out, and see whether that title be not in some other.

(a) *Bedes. Plead. 9.*

(b) 1 *Ves. sen. 248.*

I am of opinion he may, to enable him to make a defence in ejectment, even considering him as a wrongdoer against everybody." In *Bowman v. Lygon* (a), *Eyre*, C. B., observed, that "the rule laid down by Lord *Hardwicke* goes very far, and that he should not be inclined to follow it to that extent without examining further into the authority of the decision." In *Hare on Discovery*, p. 205, the learned author observes, that "the decision in the case of *Metcalf v. Harvey* seems to extend no further than is involved in the principle now established, that a bill raises a sufficient foundation for a discovery which suggests a cause of apprehension, that, if the defendant should recover in his suit or action, the plaintiff may yet be sued by some other person." The correct rule is stated in *Bellwood v. Wetherill* (b) by Lord *Abinger*, who says, that where a party is in possession of an estate, and a perfect stranger comes to turn him out, alleging himself to be the person entitled, it is but reasonable that the party so attacked should have an opportunity of knowing the plaintiff's case; so far as whether he claims as heir at law, whether he claims under a devise, or whether he alleges any imperfection in the defendant's title deeds." [*Platt*, B., referred to *Fitz. Nat. Brev. tit. "Writ de Quod ei deforceat," C. D., p. 155.*] *Buden v. Dore* (c) and *Stroud v. Deacon* (d) are express authorities that a defendant cannot be compelled to disclose the evidences of his title. The case of *Attorney-General v. The Corporation of London* (e) has been erroneously supposed to have extended the doctrine of discovery; but that decision proceeded entirely on the ground that a fiduciary relation subsisted between the Crown and the Corporation.—They also referred to *Osborn v. The London Dock Company* (f), *Whateley v. Crawford* (g), and *Carew v. Davis* (g).

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(a) 1 Anst. 1.

(b) 1 Y. & C. 218.

(c) 2 Ves. sen. 444.

(d) 1 Ves. sen. 37.

(e) 12 Beav. 8.

(f) 10 Exch. 698.

(g) Q. B., Mich. T., Nov. 26.

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The *Attorney-General* (*Honyman* with him), in support of the rule.—First, the 51st section of the Common Law Procedure Act, 1854, applies to actions of ejectment. The words are, “*in all causes* in any of the superior Courts” &c. It is true that, in the action of ejectment, there is no declaration or plea; but the statute provides, that the interrogatories may, by leave of the Court or a Judge, be delivered at any other time than with the declaration or plea.

Secondly, the defendant is entitled to the discovery sought for. It has been conceded that he has a right to know in what character the plaintiff sues—whether as heir or devisee, &c.; but that alone would be practically of little avail. The power of a Court of law to grant a discovery under the 51st section of the Common Law Procedure Act, 1854, is not limited by the rules which prevail in equity, but they are enabled to administer interrogatories so as to do substantial justice between the parties. But even in a Court of equity the defendant would be entitled to the discovery now sought for. The judgment of Lord *Hardwicke* in *Metcalf v. Hervey* is an express authority to that effect. The doctrine laid down by Lord *Redesdale* (a), and which is questioned by Vice-Chancellor *Wigram* (b), was considered in the case of *The Attorney-General v. The Corporation of London* (c), where Lord *Cottenham*, C., says, “I apprehend that the language of Lord *Redesdale* has been rather misunderstood by Vice-Chancellor *Wigram*; because, when Lord *Redesdale* says, that the plaintiff is entitled to ‘a discovery of the case on which the defendant relies, and of the manner in which he means to support it,’ Lord *Redesdale* does not intend to say, that he is entitled to all the evidence by which it is to be proved, but only that he has a right to know what the case is . . . We have it there-

(a) *Redea. Plead.* 9.

(b) *Wigr. Disc.* § 372, p. 285.

(c) 2 *Mac. & G.* 247.

fore on the authority of Lord *Redesdale*, that the plaintiff is entitled to know what the defendant's case is, and how he makes it out, but not to see the proofs by which that case is to be established."—[He was then stopped by the Court.]

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POLLOCK, C. B.—The rule must be absolute. The case of *Selby v. Selby* (a) shews that the defendant is entitled to interrogate the plaintiff as to the nature of the pedigree on which he relies. There, a bill had been filed against the defendant who claimed as heir at law. It interrogated him very particularly as to the ancestor or ancestors under whom the defendant claimed, and, amongst other things, in what parish each and every of the persons, by or through whom the defendant claimed to be heir at law of the testator, was or were born, and in what parish each and every of such persons was or were baptized, married, and buried respectively. The defendant no doubt felt that he was bound to answer as to the pedigree, for he did so, and in his answer said, that he could not answer as to the places of birth &c. of some of his ancestors, or set forth to his knowledge or belief where or in what *place* &c., not using the word *parish*. That answer being excepted to, Lord Commissioner *Eyre* held, that if he was not obliged to answer the interrogatories he should have demurred, but that he could not put in an insufficient answer.

ALDERSON, B.—The Court has a general power to require a person who seeks to disturb the possession of another, to say by what right he does so. It has been the constant practice in actions of ejectment when the declaration is vague, to order the delivery of particulars of the land sought to be recovered; then why should not the plaintiff be required to say in what character and from whom he claims?

(a) 4 Bro. C. C. 11.

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PLATT, B.—From the rule as stated in Hare on Discovery, it is clear to my mind that the defendant has a right to interrogate the plaintiff as to his pedigree.

MARTIN, B.—I am of the same opinion.

Rule absolute.

Jan. 16.

NIXON v. GREEN.

The 36th section of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, which enables execution to issue "against any of the shareholders," if the execution against the property or effects of the company proves ineffectual, means shareholders at the time of the sheriff's return of nulla bona.

SCIRE FACIAS.—The declaration set out the writ, which recited that the plaintiff recovered in the Court of Exchequer against "The Kilkenny & Great Southern & Western Railway Company, a judgment for 508*l.* 8*s.*, whereof 340*l.* 6*s.* 11*d.* remained unpaid; that a fi. fa., directed to the sheriffs of London, was issued upon the judgment against the effects of the company; and that the sheriffs returned nulla bona. The writ then proceeded thus:—"And whereas you the said F. Green, at the time of the said judgment and of the issuing of the said execution, and thence until and at the time of the notice herein-after mentioned, and thence until and at the time of the motion in open Court hereinafter mentioned, and thence hitherto, were and are a shareholder of and in the said company of divers, to wit, fifty shares of 20*l.* each; and a large amount of the said shares at the time of the said judgment and execution was, and thence hitherto has been, and is not paid up, to wit, 850*l.*"—The writ then recited, that, upon motion in open Court, after sufficient notice in writing to the defendant, the Court ordered that the plaintiff might proceed against the defendant as a shareholder of the company,

according to the "Companies Clauses Consolidation Act, 1845;" and the writ commanded the defendant (in the usual form) to appear and shew cause why the plaintiff should not have execution against him.—The declaration then stated the appearance of the defendant, &c., and concluded with the usual claim of execution.

Pleas.—First, that, at the time of the issuing of the said writ of fieri facias, the defendant was not a shareholder of and in the said company as alleged.

Secondly, that the defendant was not a shareholder of the said company at the time when the rule of the said Court ordering that the plaintiff might proceed against him as a shareholder, as alleged in the declaration, was made absolute.

Replication to first plea.—That, at the time of the judgment in the writ of scire facias and declaration mentioned, and from thence continually until and at the time of the issuing of the said writ of execution, and from thence continually until and at and after the said motion in open Court was made, and until and at and after the said sufficient notice thereof in writing to the defendant, he the defendant was a shareholder of and in the said company, as in the writ of scire facias and declaration also mentioned; and that, if afterwards the defendant ceased to be such shareholder, the same has been solely occasioned by the defendant voluntarily transferring his said shares of and in the said company, the said transfer thereof having, after the said motion in open Court, and after the defendant had such notice as aforesaid, been voluntarily and fraudulently made by the defendant with intent to defeat and hinder the plaintiff from having his execution against the defendant.

Demurrers to the pleas, and joinders therein.

Demurrer to the replication, and joinder therein.

Unthank for the plaintiff.—The pleas are bad and the replication good. By the 36th section of the 8 & 9 Vict.

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c. 16, "If any execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any of the shareholders to the extent of their shares respectively in the capital of the company not then paid up: Provided always, that no such execution shall issue against any shareholder except upon an order of the Court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open Court after sufficient notice in writing to the parties sought to be charged; and upon such motion such Court may order execution to issue accordingly: and for the purpose of ascertaining the names of the shareholders, and the amount of capital remaining to be paid upon their respective shares, it shall be lawful for any person entitled to any such execution, at all reasonable times, to inspect the register of shareholders without fee." The latter part of the clause has reference to the 9th section, which requires the company to keep a book, to be called the "Register of Shareholders," in which shall be entered from time to time the names of the shareholders, the number of their shares, and the amount paid on such shares. That section shews the meaning of the term "any of the shareholders" in the 36th section, viz. the persons whose names are on the register of shareholders at the time the execution against the property or effects of the company proves ineffectual, that is, at the time of the return of nulla bona. It is analogous to the case of bail, who have notice of the plaintiff's intention to proceed against them, by the sheriff's return to the *ca. sa.* of non est inventus. [*Alderson*, B.—Unless there is some period at which the shareholders are fixed, those against whom proceedings are taken might sell their shares, and afterwards repurchase them, and then again sell them; so that no one would ever be liable.] If the period at which the shareholders are fixed is not the return of nulla bona, it is the first step

taken against them, viz. the notice of motion. [*Alderson*, B.—It is consistent with both these pleas that the defendant was a shareholder at the time of the return of nulla bona, of the notice of motion, and also when the rule nisi was granted.]

The Court then called on

Field to support the rule.—Execution ought not to issue against any person who was not a shareholder, either at the time the Court allowed proceedings to be taken, or at the time of the issuing of the scire facias. The debt was contracted by the company, that is, the then shareholders, who had effects which, presumably, were sufficient to pay it. Therefore, those shareholders ought, in the first instance, to perform their contract by either paying the debt out of the effects of the company, or discharging it themselves. But when they assign their interest in the property of the company to other persons, the legislature has declared that the persons so taking the property shall be liable. [*Martin*, B.—Notice in writing must be given to the persons sought to be charged, and it could never have been intended that after such notice they should be at liberty to assign their shares. *Alderson*, B.—If it were so, immediately notice was given to the assignee, he might transfer them back again.] In *Dodgson v. Scott* (a) a similar question arose on the Banking Copartnership Act, 7 Geo. 4, c. 46, s. 13, by which execution upon any judgment obtained against the public officer of the copartnership may be issued against any “member for the time being;” and that was held by *Parke*, B., to mean any member at the time of the issuing of the scire facias.—He also referred to a case in this Court of *Devereux v. Emery* (b), in which similar pleas were pleaded.

(a) 2 Exch. 457.

(b) E. T., 2nd May, 1851. This case was not argued, *Peacock*, for the plaintiff, having, at the suggestion of the Court, con-

sented to amend, by withdrawing the demurrer to the pleas, there being one of them which was clearly good.

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ALDERSON, B.—The construction of the Act is very plain. It says, that “if any execution &c., shall have issued against the property or effects of the company,”—which has been done in this case—“and if there cannot be found sufficient whereon to levy such execution,”—and that fact is ascertained the moment the sheriff has returned nulla bona—“then such execution may be issued against any of the shareholders to the extent of their shares respectively in the capital of the company not then paid up,”—that is, the persons who are shareholders at the time the execution against the property or effects of the company is found to be ineffectual. But in order that no injustice may be done, and that it may be ascertained who those persons are, notice must be given, so that the persons against whom proceedings are taken may have an opportunity of shewing that they were not shareholders at the time of the return of nulla bona. The object of requiring notice is merely to do justice to the class who are sought to be charged as shareholders at the time of the return of nulla bona. Any other construction would lead to an evasion of the Act.

PLATT, B., and MARTIN, B., concurred.

Judgment for the plaintiff

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COOK v. HOPEWELL.

Jan. 19.

THE declaration stated, that the plaintiff sues the defendant for money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant; and for money found to be due from the defendant to the plaintiff on an account stated between them, and the plaintiff claims 30*l*.

Plea.—The defendant, except as to 22*l*. 8*s*. 3*d*. parcel of the sum claimed, says, that he never was indebted to the plaintiff as alleged. And as to the said sum of 22*l*. 8*s*. 3*d*., parcel &c., the defendant says, that after action brought he paid 22*l*. 8*s*. 3*d*. to the plaintiff, who accepted and received it from the defendant in satisfaction of the said claim of 22*l*. 8*s*. 3*d*., and of all damages accrued in respect thereof.—Issues thereon.

The cause was tried before *Wightman*, J., at the last Kent Assizes, when the plaintiff offered no evidence in support of the first issue; and the defendant proved, that, after the issuing of the writ, he paid the 22*l*. 8*s*. 3*d*. to the plaintiff, who accepted it, no mention being made of costs.

It was objected on behalf of the plaintiff, that this evidence did not prove the plea, inasmuch as it was pleaded both to the debt and damages, and in bar of the further maintenance of the action; and that, as damages included costs, the defendant could not succeed unless he proved that he had paid them. The learned Judge was of opinion that the case was governed by the Reg. Gen. H. T. 1853, pl. 22 (a); and that the plaintiff, instead of try-

damages. Secondly, that the Reg. Gen., H. T., 1853, r.22, did not affect the plaintiff's right to maintain the action in respect of the costs.

Action for goods sold and delivered:—

Plea, except as to 22*l*. 8*s*. 3*d*., parcel &c., never indebted, and as to 22*l*. 8*s*. 3*d*. payment after action brought of 22*l*. 8*s*. 3*d*.

"in satisfaction of the said claim of 22*l*. 8*s*. 3*d*., and all damages accrued in respect thereof." At the trial, the plaintiff offered no evidence on the first issue, and the defendant proved that he paid 22*l*. 8*s*. 3*d*. to the plaintiff, who accepted it, no mention being made of costs:

—*Held*, first, that the plea was not proved, since the costs, which were part of the damages, were not paid; and therefore the plaintiff was entitled to a verdict, with nominal

plaintiff's right

(a) "A plea, containing a defence arising after the commencement of the action, may be pleaded together with pleas of defence arising before the commencement of the action; Provided that the plaintiff may confess such plea, and thereupon

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ing the second issue, ought to have signed judgment for his costs; and his Lordship accordingly directed a verdict for the defendant, leave being reserved to the plaintiff to move to enter a verdict for him with 1s. damages.

J. Brown in last Michaelmas Term obtained a rule nisi accordingly; against which

Finlason now shewed cause.—The plea was in substance proved. *Beaumont v. Greathead* (a) shews, that a party who has received the full amount of his actual debt cannot maintain an action for nominal damages. [*Martin*, B.—The defendant has not satisfied the damages, because he has not paid the costs. *Beaumont v. Greathead* only decided, that, where a party has *before action* received the whole of his debt, he cannot maintain an action in respect of damages which are merely imaginary. But where a defendant, after action brought, pays money into Court, he must pay the costs of the writ. *Francis v. Crywell* (b) is an authority in point.] Costs are part of the damages, and can only be recovered as such. Payment of the debt is payment of the damage, if the creditor so accepts it; and in this case no claim was made for costs. In *Thame v. Boast* (c), which was an action on a cheque for 25*l.*, the defendant pleaded payment and acceptance of money (after action brought) in satisfaction of the promise, damages, and costs; and issue being joined thereon, he proved payment and acceptance of 25*l.*; and that the plaintiff, after being paid, had declined a sum offered for costs, and said that he would pay them himself: the Court held, that such proof supported the issue on the defendant's part, and was a good defence; for the plaintiff, after payment of 25*l.*, could not have proceeded in the action for damages, they being

shall be entitled to the costs of the cause up to the time of pleading such first-mentioned plea."

(a) 2 C. B. 494.

(b) 5 B. & Ald. 886.

(c) 12 Q. B. 808.

merely nominal, and could not have proceeded for costs, having no ground of action for damages. At all events this plea is an answer to so much as it professes to answer: *Henry v. Earl (a)*.

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J. Brown appeared in support of the rule, but was not called upon to argue.

PLATT, B.—I am of opinion that the plea was not proved. The case of *Henry v. Earl (a)* turned on the particular form of the pleadings. There was a special demurrer, and the question was, whether the plea, being pleaded to a part of the debt only and not to the damages, was a good answer to so much as it was pleaded to; the Court held that it was, and that judgment might be signed for any damage unanswered. In *Thame v. Boast (b)*, the defendant pleaded payment, after action brought, of a sum of money in satisfaction of the promise, damages, and costs. The jury found for the defendant, and the question was, whether the plaintiff was not entitled to a verdict for nominal damages, but the Court held, that the plea was substantially proved. There the defendant pleaded and proved that he paid the money in satisfaction of the debt, damages, and costs. Here the defendant paid the money in satisfaction of the debt and damages only, and not of the costs. Therefore, as the plea was not proved, the rule must be absolute to enter the verdict for the plaintiff with nominal damages.

MARTIN, B.—I am also of opinion that the rule ought to be absolute. The action is for a debt, to which the defendant pleads, that he never was indebted in a larger amount than 22*l.* 8*s.* 3*d.*; and as to that sum, that, after action brought, he paid 22*l.* 8*s.* 3*d.* to the plaintiff, who accepted

(a) 8 M. & W. 228.

(b) 12 Q. B. 808.

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and received it from him in satisfaction of the 22l. 8s. 3d., and of *all damages* accrued in respect thereof. There was no evidence that the plaintiff, in point of fact, received this money in satisfaction of the debt and costs; but Mr. *Finlason* contended, that, by reason of the plea being framed in this way, and the damages being merely nominal, the plea was substantially proved. But that is not correct, for the plea was not proved, unless the defendant shewed, either that the plaintiff consented to accept the 22l. 8s. 3d. in satisfaction of the debt, damages, and costs, or that the costs were paid. In *Henry v. Earl (a)*, Lord *Abinger* says, that costs form part of the damages resulting from the detention of the debt. Since, therefore, the defendant has not proved that he paid the costs as well as the debt, he has not proved his plea. The learned Judge at the trial acted upon the 22nd Pleading Rule of Hilary Term, 1853, which he thought governed the case. That, however, was a misapprehension. Before that rule was promulgated, there was a practice, that matter of defence arising after action brought could not be pleaded together with pleas of defence arising before action brought. Whether or no that practice was founded on correct decisions, is now immaterial, but the Court of Queen's Bench held, that such pleas could not be pleaded together. It being thought advisable that the practice should no longer prevail, the 22nd Pleading Rule was framed to amend it; and accordingly the rule declares that "a plea containing a defence arising after the commencement of the action may be pleaded together with pleas of defence arising before the commencement of the action." So far, the rule does nothing more than alter the old practice. But it having been suggested, that, if a defendant thought proper to avail himself of the permission to plead matter of defence arising not only before but also after action brought, it was but reasonable to afford the

(a) 8 M. & W. 228.

plaintiff an opportunity of putting an end to the cause at that stage; there was in consequence added to the rule the proviso, "that the plaintiff may confess such plea, and thereupon shall be entitled to the costs of the cause up to the time of the pleading such first-mentioned plea." The object of the proviso was simply to give the plaintiff the privilege of saying to the defendant, "As you choose to rely upon matter of defence arising after action brought, I will stop the cause, and you must pay me the costs up to the time you so pleaded." The true object and meaning of the rule is that which I have stated, and the learned Judge was in error in supposing that it governed the present case.

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BRAMWELL, B.—I am of the same opinion. The form of the plea is of itself decisive. It alleges, that, after action brought,—that is, at the time when the plaintiff was not bound to accept the debt alone—the defendant paid him a certain sum in satisfaction of the debt and all damages accrued in respect thereof. That is not true, for the cause of action was the debt and damages, not nominal, but substantial. With respect to the 22nd Pleading Rule, I will only add, that it never could have been the intention of its framers that the rule should alter the law and make a plea true which was not so before, but only that a plaintiff might have an opportunity of confessing a plea containing matter of defence arising after action brought. The case of *Beaumont v. Greathead* (a) merely amounts to this, that nominal damages are inappreciable when they do not increase the actual claim. In the case of *Thame v. Boast* (b), all that the Court decided was, that, in point of fact, the money was paid and received in satisfaction of both debt and damages, and the question was not discussed whether it could be a satisfaction in point of law. The case of *Henry v. Earl* (c) was this—The plaintiff claimed a certain debt, and

(a) 2 C. B. 494.

(b) 12 Q. B. 808.

(c) 8 M. & W. 228.

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damages for the detention of it; the defendant pleaded, that, after the commencement of the action, he paid the amount of the debt to the plaintiff, who accepted it in satisfaction of the causes of action. The plaintiff objected, that the plea was bad, since it answered two amounts by one sum. Mr. *Peacock* ingeniously argued, that the plea was pleaded to the debt only, and not to the damages; and that it was a good answer to so much as it professed to answer, and that the plaintiff might sign judgment for the part unanswered. That question is now entirely at an end, for by the 95th section of the Common Law Procedure Act, 1852, "In all actions where the plaintiff recovers a sum of money, the amount to which he is entitled may be awarded to him by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of a debt or damages." A plaintiff does not now allege that he is entitled to a debt, and damages ultra the debt, but that he is entitled to a sum of money as compensation for the breach of the engagement in respect of which he is suing. Therefore the case of *Henry v. Earl* is no authority for or against the proposition discussed on the present occasion.

Rule absolute (a).

(a) See *Kemp v. Balls*, 10 Exch. 607; *Goodwin v. Cremer*, 22 L. J., Q. B., 30.

1856.

HUTCHINSON v. HARDING, Official Manager of THE AMAZON LIFE ASSURANCE COMPANY.

Jan. 30.

THIS was a rule calling on the plaintiff to shew cause why an order of *Crowder, J.*, should not be rescinded, and why all proceedings in this cause should not be stayed until after proof, or exhibiting or making such proof as the plaintiff may be able, before and in manner directed by the Master, of his debt or demand against the Amazon Life Assurance Company, pursuant to the 11 & 12 Vict. c. 45, s. 73.

It appeared from the affidavits, that, in November, 1854, an order was made by the Court of Chancery for winding-up the affairs of the company, and the defendant was subsequently appointed official manager. The plaintiff filed in the office of the Master in Chancery an affidavit of debt made by himself, in which he claimed 294*l.* 10*s.* 6*d.* as due to him from the Company. The Master considered that the affidavit was not sufficient or satisfactory, and he required the plaintiff to attend before him and be examined *vivâ voce*. The plaintiff did not attend, but commenced the present action. Application was then made to *Crowder, J.*, at Chambers, to stay the proceedings, but his Lordship dismissed the summons, whereupon the present rule was obtained; against which

An order having been made under the 11 & 12 Vict. c. 45, for winding up the affairs of a Joint-stock Company, a claimant exhibited proof of a debt before the Master by affidavit, which he considered unsatisfactory, and required the attendance of the claimant, to be examined *vivâ voce*. The claimant did not attend, but brought an action for his claim against the official manager:—*Held*, that it was not competent for him to proceed by action, and the Court stayed the proceedings.

Roxburgh shewed cause (Jan. 26).—The question depends on the construction of the Winding-up Act, 11 & 12 Vict. c. 45. The 50th section directs, that "all actions and suits by or against the company shall be commenced and prosecuted in the name of the official manager." The 58th section enacts, that, except as is by that Act expressly provided, nothing therein contained, nor any petition or order

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under the same for the dissolution and winding-up of any company, "shall extend or enlarge, diminish, prejudice, or in anywise alter or affect the rights or remedies of creditors." The 73rd section (a) enacts, that, after the appointment of an official manager no creditor shall commence any action against the official manager "until after proof, or exhibiting or making such proof as he may be able, of his debt or demand before the Master." By sect. 74, the creditors of the company shall make proof of their debts by deposition or affidavit, as in bankruptcy. The 75th section (b) authorises the Master either to "allow or disallow, or allow as claims only, such debts and demands." The 91st section enables the Master to direct an issue or action at law &c. [*Martin, B.*—In *Prescott v. Hadow* (c) the 73rd section is explained by *Parke, B.*, who says, "The Judge has no power by this section to stay proceedings except in the case of "proof made," or of "proof exhibited." By the former is meant, until the Master has received and allowed the proof brought before him, and by

(a) Sect. 73. "That, after the first appointment of an official manager, no creditor or other person shall, except so far as the Master shall permit, have power to commence or to proceed with any action against the official manager, or against the company or any other person representing the same, or who is sued as a contributory thereof, until after proof, or exhibiting or making such proof as he may be able, of his debt or demand before the Master, as hereinafter mentioned; and it shall be lawful for any Judge of the Court in which such action shall be pending, upon summons taken out before him for that purpose, to order that all further proceed-

ings in such action shall be stayed until after such proof shall have been made or exhibited before the Master."

(b) Sect. 75. "That the Master shall, upon proof made or offered and exhibited before him of the debts and demands due or claimed from or against the company, or any of them, either allow or disallow, or allow as claims only, such debts and demands respectively, according to the nature of the case and of the proofs adduced or exhibited before him, and shall, by writing under his hand, declare such allowance and disallowance, or such allowance as claims only."

(c) 5 Exch. 726.

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the latter, until the creditor has given to the Master all such proof as he is able to give of his right to payment as against the company."'] Where a creditor of a Joint Stock Company attached the funds of the company in the hands of their bankers, and an order was afterwards made for winding-up the affairs of the company, the Court of Chancery refused to restrain the creditor from proceeding: *In re The India and Australia Steam Packet Company* (a). If the Master is dissatisfied with the proof before him, the creditor has a right to establish his claim by an action at law. Under the 91st section the Master has no power to direct an action against the official manager without the consent of the creditor: *Ex parte The East of England Banking Company* (b). In that case *Knight Bruce, L. J.*, observed during the argument, that "all the creditor's rights remain as they were, subject only to this condition, that the legislature has imposed upon him the necessity, before he sues, of going in before the Master." In *In re The Sea, Fire, and Life Assurance Company* (b), the holders of an instrument of credit for 500*l.*, which purported to be signed by two directors of a Joint Stock Company, but which it was alleged did not comply with the requisites of the 7 & 8 Vict. c. 110, brought an action on the instrument against the company, which was stayed by an order for winding-up the affairs of the company: the Master allowed the claim as a debt against the company; and on motion by a contributory to reverse or vary the Master's order, it was held, that an action was the proper course of proceeding, as the Joint Stock Companies Act contemplated, in reference to the liability of shareholders, that either party might have all the matters of fact as well as of law put in issue and dealt with by a Court of common law; and that the order must be varied to enable the holders of the instrument to proceed at law.

(a) 17 Sim. 15.

(b) 1 Jur. N. S. 300.

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HARDING.

Here the plaintiff, having exhibited his proof before the Master, has a right to proceed at law. The legislature has expressly guarded against interference with the rights of creditors.

Aspland in support of the rule.—By the 73rd section the plaintiff is restrained from proceeding at law “until after proof, or exhibiting or making such proof as *he may be able*, of his debt or demand before the Master as hereinafter mentioned.” That refers to the mode of proof prescribed by the 74th section. There is no affidavit that the plaintiff is not able to give more proof before the Master. The object of the enactment is, to enable the Master to determine what amount it will be necessary to raise by contributions. In *Prescott v. Hadow* (a), proof of the debt was allowed by the Master: here the plaintiff has not produced sufficient materials to enable the Master to determine whether he ought to allow the claim as a debt or as a claim, or to disallow it. In the case of *The India and Australia Steam Packet Company* (b), the proceedings were commenced before any official manager was appointed; and, moreover, that was the case of an attachment in the Lord Mayor’s Court. *Ex parte Dayrell* (c) decided, that where a contributory brings in a claim on account of monies advanced by him, the Master must decide upon the claim as against each contributory, and must not leave the claimant to establish his right at law.—He also referred to *Ex parte Pritchard* (d).

Cur. adv. vult.

POLLOCK, C. B., now said—In this case the question was, whether it was competent for the plaintiff to commence this action after having exhibited before a Master in

(a) 5 Exch. 726.

(b) 17 Sim. 15.

(c) 1 Jur. N. S. 1129.

(d) 23 L. J., Chanc., 958.

Chancery, under the Winding-up Act, some proof of his claim, the Master not being satisfied, and requiring that he should attend in person and give further proof. Without saying whether the Master could reasonably require the personal attendance of the claimant, who might be residing at a great distance, and could not attend without considerable expense, we are of opinion, that, where a claimant has merely sent in his claim by affidavit, and the Master has required some further proof, it is not competent for the claimant to take no notice whatever of it, and commence an action at once. The proviso in the 74th section is "that it shall be lawful for the Master to allow or direct the proof of such debts or demands, or any of them, to be made by the official assignee, or by the creditors, *in such other form and in such manner* as he shall think fit." The Master has therefore clearly some power to give a direction as to the mode of proof, though this direction must be a reasonable direction, and no doubt may be reviewed by superior authority. But without deciding whether what the Master required in this case was proper, we think that the claimant is not justified in paying no attention whatever to it; and therefore the rule must be absolute.

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ALDERSON, B., added—The claimant is to make such proof as he can give. He does not make an affidavit that he can give no more, and consequently he has not complied with the statute.

1856.

Jan. 15.

CARR v. ACRAMAN and Others.

In October, 1852, E., a trader, assigned to the plaintiff all his household furniture and effects then on his premises, as a security for money lent, with a power, in default of payment, to seize and take possession of the property thereby assigned, and all other goods, chattels, and effects which might be found on the premises. In January, 1855, E. assigned all his estate and effects to trustees, for the benefit of the creditors. In the following February, the plaintiff seized the goods, &c. then on the premises of E.; and in March a fiat in bankruptcy issued against E., the act of bankruptcy being the above assignment of his

TROVER for certain machinery and stock in trade of a woollen factory, and household furniture &c.—Pleas: Not guilty; and that the machinery, stock in trade, &c., was not the property of the plaintiff.

At the trial, before *Williams, J.*, at the last Bristol Assizes, the following facts appeared:—The defendants were the assignees of one England, a bankrupt, who had carried on the business of a wool-stapler, at Trowbridge. By indenture of the 11th October, 1852, England assigned, by way of mortgage, to the plaintiff, all his household furniture, utensils, and effects then on the premises, as a security for money lent. This indenture contained a power enabling the plaintiff, in default of payment of the sum thereby secured, to seize and take possession of the property thereby assigned, and also any other goods, chattels, and effects of England which might be found on his premises. On the 23rd January, 1855, England assigned all his estate and effects to trustees, for the benefit of his creditors. On the 23rd February, the plaintiff demanded the mortgage money, which not being paid he took possession of all the effects then on the premises, under the power contained in the deed of the 11th October, 1852. Part of these effects were not conveyed by the deed of assignment. On the 20th March, 1855, a fiat in bankruptcy issued against England, the act of bankruptcy being the above-mentioned assignment; and the defendants, as his assignees, sold the property in question.

In an action by the plaintiff against the assignees for selling the goods so seized by him:—*Held*, that though the assignment by E. of his estate and effects to trustees was void as against creditors, yet it operated to transfer to the assignees the property not included in the assignment to the plaintiff, and so defeated his title, which would otherwise have been valid by the seizure.

It was submitted on behalf of the defendants, that the plaintiff could not recover in respect of the goods not included in the deed of the 11th October, 1852. It was contended on the part of the plaintiff, that, as the assignment of the 23rd January, 1855, was an act of bankruptcy, and void as against creditors, the plaintiffs were entitled to recover in respect of the whole of the goods seized. The learned Judge left it to the jury to say whether the plaintiff had notice of the act of bankruptcy; and the jury found that he had not: whereupon a verdict was entered for the plaintiff for 271*l.*, the entire value of the goods, leave being reserved to the defendants to reduce the amount to 90*l.*, being the value of the goods included in the deed of assignment.

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Kinglake, Serjt., in the following Term, obtained a rule nisi accordingly; against which

Montague Smith and *Coleridge* now shewed cause.—According to the authority of *Congreve v. Evetts* (a), the execution of the power by taking possession of the goods on the bankrupt's premises, though not assigned by the mortgage deed, would give the plaintiff a valid title to the goods, unless the bankrupt had previously conveyed them to some other person. The defendants seek to defeat the plaintiff's title by the assignment of the 23rd January, 1855, which they rely on as an act of bankruptcy. But if that assignment be treated as fraudulent and void, it is void as against all the creditors of the bankrupt. The defendants cannot set it up as valid against a particular creditor and as void against the others. If it was void no property passed to the defendants. [*Alderson*, B.—It might be void as against creditors, but valid as a conveyance to the assignees under the bankrupt law.] If the assignment operated to pass

(a) 10 Exch. 298.

1856.
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the property to the trustees, then the assignees have no title; if the assignment is void, the seizure of the goods by the plaintiff is a transaction with the bankrupt protected by the 133rd section of the 12 & 13 Vict. c. 106.—They also referred to *Butler v. Hobson* (a), *Goldschmidt v. Hamlet* (b), and *Graham v. Witherby* (c).

Kinglake, Serjt., and *Barstow* appeared in support of the rule, but were not called upon to argue.

ALDERSON, B.—The rule must be absolute. The property in question would have passed to the plaintiff if he had seized it whilst it was the property of the bankrupt, and before he conveyed it to trustees for the benefit of his creditors. Then it is argued, that, because that conveyance was an act of bankruptcy, and void as against creditors, the plaintiff is remitted back to his original right. But the only effect of the assignment being an act of bankruptcy and void, is to transfer the title to the property from the trustees to the assignees.

PLATT, B.—I am of the same opinion.

MARTIN, B.—For the purpose of rendering an assignment by a trader of his property an act of bankruptcy, the deed must be invalid as against creditors, and consequently the law transfers the property to the assignees for the benefit of the creditors. The power of the plaintiff to seize future property was a license, and the conveyance by the bankrupt to the trustees operated as a revocation of that license.

Rule absolute.

(a) 5 Scott, 798.

(b) 6 M. & Gr. 187.

(c) 7 Q. B. 491.

1856.

PETRIE v. NUTTALL.

Jan. 16.

TRESPASS for breaking and entering certain land of the plaintiff.

Plea—That, before and at the said times when &c., there was and of right ought to have been a certain common and public highway, into, through, over, and along the land of the plaintiff, for all persons to go, return, pass, and repass, on foot, and with horses, cattle, carts, and carriages, at all times of the year, at their free will and pleasure: wherefore the defendant, having occasion to use the said way, did, at the said times when &c., walk along the said way: *quæ sunt eadem*, &c.

A verdict of guilty, and judgment thereon in an indictment for obstructing a public highway, cannot be pleaded as an estoppel in an action brought by the party convicted against a third person for using the way.

Replication—The plaintiff joins issue on the said plea.

Rejoinder—That the plaintiff ought not to be admitted to take issue on the defendant's plea, and to deny, that, before and at the said several times when &c., there was and ought of right to have been a certain common and public highway into, through, over, and along the said land of the plaintiff, in which &c.; because the defendant says, that before any of the said times when &c., and before and at the time of the taking of the inquisition and of the finding the verdict hereinafter mentioned, John Petrie, William Petrie, James Petrie, and Joseph Petrie, some or one of them, were or was seised in their or his demesne as of fee of and in the said land in which &c., and were possessed of the said land; and that thereupon, on the 29th of August, A. D. 1853, at the general sessions of the peace of our lady the Queen, holden at Salford, in and for the county Palatine of Lancaster, it was by the oath of twelve jurors, good and lawful men &c., then and there sworn and charged to inquire for our said lady the Queen and the body of the said county, presented that theretofore, and before the committing of

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any of the offences in that indictment charged and stated, to wit, on the 1st of June, A. D. 1848, there was and thence hitherto has been and still was a certain common Queen's highway called, to wit, Rope-street, situate at the parish of Rochdale, in the county of Lancaster, for all the subjects of our said lady the Queen to go, return, pass, repass, ride, and labour, on foot and on horseback, and with cattle, carts, and carriages, at their free will and pleasure, without any impediment or obstruction whatsoever; that afterwards, and whilst the said common Queen's highway was such common Queen's highway as aforesaid, to wit, on &c., at the parish aforesaid &c., the said John Petrie, William Petrie, James Petrie, and Joseph Petrie unlawfully, wilfully, and injuriously did erect, build, put, and place, and cause to be erected, built, &c. in, upon, and across the said common Queen's highway, to wit, at the easterly end thereof, a certain wall and building made of, to wit, bricks, stone, and mortar, and being of great length and height, to wit, &c.: By means whereof the said common Queen's highway, then and during all the time aforesaid, was greatly obstructed, and the subjects of our lady the Queen then and during all the time aforesaid could not go, return, pass, repass, ride, and labour, on foot and on horseback &c., in, by, through, and over the said highway, as they were wont and accustomed and of right ought to do, to the great damage and common nuisance of all the subjects of our lady the Queen, in, by, and through the same highway, to wit, Rope-street, going, returning, passing, repassing, &c.: contra pacem, &c. —The plea then stated that the indictment was removed into the Court of Queen's Bench; that the defendants pleaded not guilty, upon which issue was joined; that, on the 9th of August, 1854, at the Liverpool Assizes, the issue was tried by a jury, who found that the defendants were guilty of the matters contained in the indictment; that a day was given by the Court until the 7th of May, 1855, to hear judgment—At which day (the parties being present),

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and it appearing and being proved to the Court that the nuisances charged in the indictment had been abated, it was considered and adjudged, and ordered by the Court, that the said John Petrie, William Petrie, James Petrie, and Joseph Petrie should, for the said nuisance so as aforesaid charged upon them by the said indictment, pay a fine to our lady the Queen of 1s. each, prout patet, &c.—The plea then averred, that the highway in the indictment mentioned was the same highway as in the plea mentioned; and that the land of the plaintiff in the declaration mentioned was the same land as that on which the wall and building in the indictment mentioned were built.—That after the giving of the said verdict, and before any of the said times when &c., the wall and building were removed, and the said highway was again opened to the plaintiff; and that this action was brought and is prosecuted by the plaintiff against the defendant on account of the defendant having, after the said verdict was given, and after the said wall and building had been removed as in the record of the judgment mentioned, and after the judgment had been given, walked along the said highway over the said land on which the said wall had been so erected and built as aforesaid, and for no other cause of action whatever. That, after the said verdict was given, the said John Petrie, William Petrie, James Petrie, and Joseph Petrie delivered the possession of the said land to the plaintiff, and the plaintiff took possession of the said land as a trustee for the said John Petrie, William Petrie, James Petrie, and Joseph Petrie, and that the plaintiff is, in respect of the said land, privy in estate to the said John Petrie, William Petrie, James Petrie, and Joseph Petrie, some or one of them.—The plea then stated, that the defendant was one of the prosecutors of the said indictment, and concluded with a prayer of judgment, if the plaintiff ought, contrary to the said verdict and judgment, to be admitted to take issue on the said plea, &c.

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Demurrer, and joinder therein.

Hugh Hill (Tindal Atkinson with him) in support of the demurrer.—The question is, whether the verdict and judgment on the indictment can be pleaded as an estoppel in this action, and it is submitted that they cannot. It is a primary rule, that estoppels must be reciprocal. In Co. Litt. 352. a. it is said, “first, every estoppel ought to be reciprocal, that is, to bind both parties; and this is the reason that regularly a stranger shall neither take advantage nor be bound by the estoppel: privies in blood as the heir; privies in estate as the feoffee, lessee, &c.; privies in law as the lords by escheat, tenant by the curtesie, tenant in dower, the incumbent of a benefice, and others that come under by act of law, or in the post, shall be bound and take advantage of estoppels.” Great injustice might ensue if a party who claimed a civil right, instead of trying that right by action, should proceed by indictment, and then set up the verdict and judgment as an estoppel. Treating the judgment in question as a judgment *in personam*, it would not be evidence either for or against strangers of the right of way. In Starkie on Evidence, p. 363, 4th ed., it is said: “As a general rule, a verdict or judgment in a criminal case is not evidence of the fact upon which the judgment was founded in a civil proceeding. . . . The main objection to the reception of such evidence is, that there would be no mutuality; for an acquittal of a party on a criminal proceeding would not be available in a civil action.” The law is stated in similar terms in Taylor on Evidence, sect. 1505, 2nd ed., and Phillipps on Evidence, p. 27, 10th ed. It is not denied that this verdict and judgment would be admissible in evidence upon another indictment against the same or other parties; but that proceeds on a different principle, viz. that there has been an adjudication by a Court of competent jurisdiction upon a matter of a public nature:

Regina v. Haughton (a). Such adjudications are regarded as a species of reputation, and are admissible wherever reputation would have been evidence: *Reed v. Jackson* (b). An award is not evidence of a fact against the party to be affected by the proof of it in a criminal case: *Regina v. Fontaine Moreau* (c); and yet an award is in its nature as final as a judgment: *Dunn v. Murray* (d). A conviction before justices is not evidence of the offence in a civil suit brought by the party convicted: *Justice app., Gosling* resp. (e). The judgment in question is not a judgment *in rem*. A judgment *in rem* has been defined as an adjudication upon the status of some particular subject-matter by a tribunal having competent authority for that purpose: 2 Smith's Lead. Cas. 439. Instances of such judgments are collected in Taylor on Evidence, sect. 1488, 2nd ed. This judgment does not declare the status of the road, but merely the status of a nuisance. In an action for the price of rum, the defence being that the rum was adulterated, *Gibbs*, C. J., ruled that the record of the condemnation of the rum was admissible, being *in rem*; but he refused to admit the record of conviction for penalties, on the ground that it was *in personam*, and therefore not evidence where the parties were different: *Hart v. McNamara* (f). An adjudication in the Court of Admiralty, that a vessel is a lawful prize, is conclusive as to the status of the vessel, but it is not evidence against another party whose vessel was captured at the same time and under the same circumstances. In the case of an indictment for a forcible entry involving a question of title, the judgment of restitution would not be evidence of the prosecutor's title in a subsequent action of ejectment. This is a mere judgment *in personam*, and not conclusive as an estoppel.

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(a) 1 E. & B. 501.
 (b) 1 East, 355.
 (c) 11 Q. B. 1028.

(d) 9 B. & C. 780.
 (e) 12 C. B. 39.
 (f) 4 Price, 154, note.

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Mellish contra.—The question is, whether an owner of land, who has been convicted of obstructing a public highway, may, after removal of the obstruction, maintain an action against any person who uses the highway. The verdict and judgment would be conclusive evidence in another indictment against the same parties; and therefore, as they were owners of the land in fee simple, it would also be conclusive evidence against all persons claiming under them; so that the land must for ever remain as a highway. Therefore, the argument for the plaintiff leads to this absurdity, that, though the owners cannot build upon it, or use it in any manner inconsistent with its being a public highway, they may nevertheless recover damages against any person who does use it as a highway. [*Alderson*, B.—It may have been, that the only persons who could have proved that it was not a highway, were those who were indicted. Suppose this action had been tried before the indictment, and the jury had negatived the highway, would the verdict in that action have been evidence on the indictment?] A record of conviction on an indictment against a parish for not repairing a road, is conclusive evidence of the liability of that parish to repair: *Rex v. St. Pancras* (a). An acquittal on such an indictment is not evidence, because the ground of acquittal does not appear; it may have been that the highway was not out of repair. But a conviction of a former owner of lands on an indictment for non repair of a road *ratione tenuræ* is evidence of liability to repair, as against a subsequent purchaser of the same lands: *Regina v. Blakemore* (b). So a conviction on a presentment before justices, that a road is out of repair, and that a particular township ought to repair it, is evidence in a subsequent indictment against the township, that the road was in that township: *Regina v. Haughton* (c). This is a judgment *in rem*. The adjudication of the Court, that the

(a) 1 Peak. N. P. 286. (b) 21 L. J., M. C., 60. (c) 1 E. & B. 501.

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obstruction be removed, is an essential part of the judgment; and if it be omitted when the indictment charges a continuing nuisance, there would be error on the record: *Rex v. Stead* (a); unless, indeed, it be proved to the satisfaction of the Court that the obstruction has been already removed: *Rex v. Incledon* (b). All convictions are, to some extent, judgments *in rem*. If a person has been convicted of felony by a Court of competent jurisdiction, another Court cannot say that he is not a felon. [*Alderson, B.*—That is a judgment declaring the status of the party.] In this case, so far as regards the removal of the obstruction, the judgment is binding on all persons. If the party convicted had obstructed the highway by building a house, the judgment of removal would affect all persons who occupied it. The Court directs the obstruction to be removed, in order that the land may for ever be used as a highway; and it would prevent the judgment of the Court from being carried into effect, if the fact of its being a highway could be afterwards disputed. [*Alderson, B.*—The case of *Rex v. Wilcox* (c) shews that the judgment, that the obstruction be removed, is not a punishment of the party convicted, but an order for the removal of that which is a grievance to other people.] This is, in effect, a proceeding between the same parties, for the plaintiff claims under the persons who were convicted: *Blakemore v. The Glamorganshire Canal Company* (d).—He also referred to *Lord Faversham v. Emerson* (e).

Hugh Hill was not called upon to reply.

ALDERSON, B.—The plaintiff is entitled to judgment. It is essential to an estoppel that it be mutual, so that the same parties or privies may both be bound and take ad-

(a) 8 T. R. 142.

(b) 13 East, 164.

(c) 2 Salk. 458.

(d) 2 Cr. M. & R. 133.

(e) Ante, p. 385.

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vantage of it. The Crown and subject were the parties to the indictment; and therefore it was not between the two parties to this action. The distinction is shewn by the authority cited in Viner's Abridg. Estoppel (F), 35, where it is said: "If a man, indicted of extortion or trespass, puts himself into the grace of the King, and makes fine, and after the party sues against him thereof by bill or writ, and he pleads not guilty, he shall have the plea, and the making of fine to the King shall not estop him." That is precisely this case, and we ought to follow the same rule. No doubt the judgment in the indictment may be given in evidence upon the trial of the issue as to whether the locus in quo is a public highway; but it cannot be pleaded as an estoppel. It has been ingeniously argued by Mr. *Mellish*, that to exclude the estoppel would lead to absurd consequences; but there is practically no real absurdity, for a verdict between two parties is not an estoppel as against other persons.

PLATT, B.—I am of the same opinion. Viner's Abridg. Estoppel (F), 33, citing Bro. Estoppel, pl. 159, is also an authority in the plaintiff's favour.

MARTIN, B.—I also think that the plaintiff is entitled to judgment. I must, however, confess that I feel strongly the force of Mr. *Mellish's* argument, that, if the judgment in this indictment is conclusive against the party convicted and all persons claiming under him, it is absurd that those who are bound by that judgment should be able to bring an action against anyone who uses the highway. But it is impossible to get over the authorities from the time of Lord *Coke* to the present day, which shew that an estoppel must be mutual between the parties; and that, if by the rules of law it cannot be pleaded, the matter must be determined by a jury. This was pointed out in the late

case of *Lord Faversham v. Emerson* (a). If the judgment is offered in evidence at the trial, there will be an opportunity of taking the opinion of a Court of error as to whether it is *conclusive*; but it is sufficient at present to say, that it cannot be pleaded as an estoppel.

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Judgment for the plaintiff.

(a) Ante, p. 385.

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Jan. 22.

BOVILL moved (January 14) for a rule to shew cause why the verdict for the defendant in this case should not be set aside, and a verdict entered for the plaintiffs, pursuant to leave reserved (a).

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was an action of trover to recover the value of nine casks of tartaric acid. It appeared at the trial, before the Lord Chief Baron, at the London Sittings after last Term, that, in the year 1853, the plaintiffs had sold considerable quantities of tartaric acid through their

Where a vendee obtains possession of a chattel, with the intention of the vendor to transfer both the property and possession; although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract or obtain the possession, the property vests in the vendee until the ven-

dor has done some act to disaffirm the transaction; and consequently, if, before the disaffirmance, the vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transferee is good against the vendor.

Therefore, where A. falsely and fraudulently represented to the plaintiffs that he was authorised by and acting on behalf of V. N. & Co. in the purchase of certain goods, and the plaintiffs, in consequence of such false and fraudulent representation, delivered the goods to A. with intent to transfer to him the property in them, and A. pledged the goods with the defendant for a *bonâ fide* advance:—*Held*, that the plaintiffs could not maintain an action for the goods, until they had paid or tendered to the defendant his demand.

(a) The facts and authorities cited fully appear in the judgment.

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brokers, Jones, Thompson & Co., and Grey & Co. A person named Ellis had become the purchaser of, and was entitled to the delivery of, eight tons of this tartaric acid. A broker, named Leash, by the direction of one Anderson, who stated that he was authorised by, and was acting on behalf of, Van Nottin & Co., bought from Ellis these eight tons. Ellis thereupon gave to Leash delivery orders upon the plaintiffs, which directed the acid to be delivered at the Custom-house quay to Leash's order. Leash indorsed these orders, and delivered them to Anderson; Anderson sent the orders to the plaintiffs, and afterwards called upon them himself. He then stated, that, although the acid had been bought in Van Nottin & Co.'s name, he had really bought it for himself, and requested the plaintiffs to deliver the nine casks now in question at the Custom-house quay for him. The plaintiffs assented, and sent the nine casks to the Custom-house quay, deliverable to their own order, and afterwards, at Anderson's request, made out a delivery order to him. He went to the Custom-house quay and had the nine casks transferred into his own name. He afterwards borrowed money from the defendant, upon the pledge of this acid, and it was transferred and actually delivered to him, he having *bonâ fide* advanced the money upon the faith of the pledge. Anderson had really no authority from Van Nottin & Co. to buy the acid, and his statement to Leash to this effect was false. He afterwards became bankrupt, not having paid for the acid, and has since been transported for felony.

The jury found a verdict for the defendant. A motion has been made by Mr. *Bovill* for a new trial, upon the ground that, upon the above facts, the plaintiffs were entitled to the verdict. We are of opinion that they were not, and that the verdict is right. It may be assumed, that a false and fraudulent misrepresentation was made by Anderson to the plaintiffs, and to Ellis through Leash, and that they acted upon it. Upon this misrepresentation, they

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not merely handed over a delivery order to Anderson, but they did so with the intention and in order to transfer the property in the nine casks of acid to him as vendee; and we apprehend it is quite clear, that, when a vendee obtains possession of a chattel, with the intention by the vendor to transfer both the property and possession, although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract or obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction; and the legal consequence is, that if, before the disaffirmance, the fraudulent vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transferee is good against the vendor. This is exactly the position of the present plaintiffs; and we entertain no doubt that they are not in a condition to maintain an action against the defendant, in which they insist upon a right to the possession of the acid, until they have paid or tendered to him his demand in respect of the advance to Anderson. This is stated to be the law by Baron *Parke* in *Load v. Green* (a), and it is expressly confirmed and acted upon by the Court of Common Pleas in *White v. Garden* (b). Some old authorities there mentioned are also directly in point.

Several cases were cited by Mr. *Bovill*, but not one of them in any way supported the proposition which he sought to establish. In *Boyson v. Coles* (c), there was no sale at all, for there was no purchaser: there was therefore no one in whom the property could vest, either absolutely or defeasibly. In *M'Ewan v. Smith* (d), the only matter decided was, that a delivery order, not acted upon, does not destroy a vendor's lien. In *Dyer v. Pearson* (e), a person, who had no authority to sell, sold the goods: it

(a) 15 M. & W. 216.

(d) 2 H. L. Cas. 303.

(b) 10 C. B. 919.

(e) 3 B. & C. 38.

(c) 6 M. & Sel. 14.

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was a question of principal and agent. In the present case, no such question arises; the plaintiffs were the owners of the goods. In *Barton v. Williams* (a) the question was also one of principal and agent; and it has no bearing upon the present question. These were the only cases cited by Mr. Bovill, and not one of them, in the slightest degree, militates against the principle which, in our judgment, determines this case.

Rule refused.

(a) 3 Bing. 139.

Jan. 30. In the Matter of the Estate and Effects of the EARL OF CORNWALLIS, deceased.

A testator, by his will, bequeathed certain annuities, and died on the 21st of May, 1852.

On the 19th of May, 1853, and before the duty on the annuities was calculated, the Succession Duty Act, 1853, came into operation:—*Held*, that the duty was chargeable under the Legacy Duty Act, 36 Geo. 3, c. 52, and not under the Succession Duty Act.

THIS was a rule calling on the executors of the late Earl of Cornwallis, to shew cause why they should not deliver to the Commissioners of Inland Revenue an account of all annuities bequeathed by his will, the duties on which were directed to be paid out of his residuary personal estate; and why the value of the said annuities should not be calculated, and the duties paid thereon.

It appeared that the Earl of Cornwallis died on the 21st of May, 1852, and his will was proved on the 28th of June in the same year. "The Succession Duty Act, 1853," (16 & 17 Vict. c. 51) received the royal assent on the 4th of August, 1853, but came into operation on the 19th of May, 1853, (sect. 54). After that time the executors offered to pay the duties on the annuities, upon a computation made under the Legacy Duty Act, 36 Geo. 3, c. 52; but the commissioners required the duties to be computed under "The Succession Duty Act, 1853," whereupon the present rule was obtained; against which

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Montague Smith and *J. H. Hodgson* shewed cause (January 25).—The question turns on the 31st section of "The Succession Duty Act, 1853," which enacts, that, "Where it shall be required to calculate, for the purposes either of this Act or of the Legacy Duty Acts, the value of any annuity, or of any interest chargeable with duty as an annuity, such value shall, after the time appointed for the commencement of this Act, be calculated according to the tables in the schedule annexed to this Act, and not according to the tables in the schedule annexed to the Act of the 36 Geo. 3, c. 52, and such annuity or interest shall be chargeable with duty accordingly." That enactment is prospective only. It means, that "when it shall *thereafter* be required to calculate," &c. The duty on these annuities attached and was chargeable immediately the legacies vested; it was a debitum in presenti solvendum in futuro. It is true, that an executor cannot be compelled to pay a legacy until after a year from the testator's death; but that allowance is for the convenience of the executor, in order that he may ascertain the debts and assets, and so make a proper distribution of the estate: 2 Wms. Exors. 1190, 4th edit.; 2 Roper on Legacies, 1245, 4th edit.; the duty payable on the legacy, whether a gross sum or an annuity, vests at the time of the testator's death. The 8th section of the 36 Geo. 3, c. 52, enacts "that the value of any legacy given by way of annuity, &c., shall be calculated, and the duty chargeable thereon shall be charged, according to the tables in the schedule hereunto annexed; and the duty chargeable on such annuity shall be paid by four equal payments, the first of which payments of duty shall be made before or on completing the payment of the first year's annuity, and the three others of such payments of duty shall be made in like manner, successively, before or on completing the respective payments of the three succeeding years annuity respectively." Therefore, as the first instalment of the duty was payable at the time of the payment of the first

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year's annuity, "it was required to calculate" the value of the annuity before that time. [*Pollock*, C. B.—The 31st section of the Succession Duty Act ought to be read thus:—"Where it shall, *after the 19th of May, 1853*, be required to calculate," &c. Without clear language we ought not to decide that an executor who delayed making up his accounts, must pay a different duty from one who makes them up quickly; that would, in effect, be fining the legatee for the delay of the executor.] The Legacy Duty Acts apply to personal property only; the Succession Duty Act includes every kind of property, the succession to which is acquired by death: (sect. 2). Under the latter Act personal property does not include leaseholds: (sect. 1); and by section 19 no legatee is to be charged under the Legacy Duty Acts with duty "*not then already due*" in respect of leaseholds. That provision shews, that the question, whether duty is payable under that Act, depends on whether or no it was due at the time the Act came into operation. By sect. 18, no person charged with duty under the Legacy Duty Acts shall be charged under the Succession Duty Act in respect of the same property; but, unless the latter Act be construed as prospective only, it will, in effect, repeal the Legacy Duty Acts. All the other provisions of the Succession Duty Act are clearly limited to property acquired after the 19th of May, 1853; and it would be a singular construction, to hold that the 31st section applies to property acquired before that time.

Pigott for the Crown.—Reading the 31st section of the Succession Duty Act according to the natural meaning of the words, the duty on these annuities is chargeable under that Act; whereas if it be construed as contended for by the other side, new words must be introduced into the section. Prior to the 36 Geo. 3, c. 52, no duty was payable on legacies by way of annuity. The 8th section of that Act requires, that, before the duty is "*charged*," not before it is

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"chargeable," it shall be calculated; and the practice has always been to calculate the duty at the time it is charged, that is, at the respective times when the four payments were made. The language of the 31st section of the Succession Duty Act has been used with reference to that practice. The duty is not "*required* to be calculated" until the Crown seeks to enforce its payment. Though the duty attached before the 19th of May, 1853, it had not become a *debt* for which the Crown could have sued. [*Martin*, B.—At the time of the testator's death, a certain amount of duty became payable, and we ought not, without clear language, to hold that another amount is payable.] The 31st section in express terms says, that wherever, after the commencement of that Act, it shall be required to calculate the value of an annuity, it shall be according to the tables in the schedule of that Act. If the Act had been intended to apply only to annuities given after it came into operation, the legislature would have used words to that effect, as in the 19th section. The omission of such words shews, that the 31st section was meant to apply to duty not then paid, although it might have previously attached.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B.—In this case the facts necessary to enable the Court to decide it are very few, and not complicated. It appears that the late Earl Cornwallis died on the 21st of May, 1852, leaving by his will certain legacies by way of annuity. At that time the law which regulated the legacy duty upon these annuities depended on the 8th section of the 36 Geo. 3, c. 52. That section provides, that the value of any legacy given by way of annuity shall be calculated, and the duty chargeable thereon shall be charged, according

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to the tables in the schedule to that Act, and paid by four equal payments, the first payment to be on or before the payment of the first year's annuity. It is clear, therefore, that the legislature intended that what may be called the capitalised value of the annuity, calculated according to certain tables, should be the value on which legacy duty was payable; and as this was so, and the legacy was given by Earl Cornwallis's will, we think that the value of the legacy as it then was, must be the value on which the duty was payable. The fact of making the calculation, and the time when the calculation was actually made, seems to us not material, being in truth only a sum in arithmetic, as soon as the age of the annuitant at the time of Earl Cornwallis's death was ascertained.

Then came the Succession Duty Act, which came in force on the 19th of May, 1853. By the 31st section of that Act, it was provided, that "where it shall be required to calculate, for the purposes either of this Act or of the Legacy Duty Acts, the value of any annuity, or of any interest chargeable with duty as an annuity, such value shall, after the time appointed for the commencement of this Act, be calculated according to the tables in the schedule annexed to this Act, and not according to the tables in the schedule annexed to the Act of the 36 Geo. 3, c. 52." But we think this clause ought to be read as confined to annuities given as legacies after the Act came in force, and requiring to be calculated in order to capitalise them, and on that capitalised amount to charge the duties thereon. But as to annuities given at a previous time, whose value was already required to be calculated according to another table, and on which calculation a definite amount of duty had then already become due, we think that the 31st clause has no operation.

We cannot think that the Succession Duty Act could have intended to do so unjust a thing as to increase the

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amount of a legacy already ascertainable by mere calculation, and on the faith of which amount the executors may, for aught we know, have already acted. They had the power of purchasing, and may have purchased, before the Succession Duty Act came into operation, an annuity from the Government, under the schedule to the 36 Geo. 3, c. 52; and if they had done so, and assigned such annuity to the legatee, they would have fully paid the legacy, and would have charged the estate with the purchase-money. It would be monstrous, after this, to charge them with duty on a larger value than that for which they had actually bought an annuity of the same amount from the Government themselves, and charged the purchase-money for it to the account of the estate already. We think, therefore, that the 31st section must be applied only to annuities given after the 19th of May, 1853; and the result is, that the present rule should be made absolute, with a declaration added thereto, that the duties should be calculated according to the schedule and tables contained in the Act, 36 Geo. 3, c. 52.

Rule absolute accordingly.

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Jan. 16. **MARCON and Another v. BLOXAM, Executor of SUSANNAH ARNOLD.**

THE declaration stated, that, on the 14th of January, 1850, by an indenture then made between Susannah Arnold of the first part, Henry Arnold of the second part, and the plaintiffs of the third part, Susannah Arnold and Henry Arnold did for herself and himself, and her and his heirs, executors, &c., jointly and severally covenant with the plaintiffs, their executors, &c., to pay them 2800*l.*, with interest at 5*l.* per cent., on the 14th of January, 1870, or at such earlier day as the plaintiffs should appoint for payment thereof by notice in writing to be given to Susannah Arnold, (inter alia) his furniture, plate, books, pictures, &c. subject to the payment of his debts, to S. A. for life, and after her decease to H. A. The deed also recited a decree of the Court of Chancery, by which it was ordered that the furniture and other articles aforesaid should be sold, and the proceeds paid into Court; that the books and pictures had been valued at 2050*l.*, at which sum H. A. had agreed to purchase them; and that, to enable him to do so, the plaintiffs had agreed to lend him 2050*l.*, and a further sum of 749*l.* 5*s.* upon the security of the joint and several covenant of S. A. and H. A., and an assignment (inter alia) of the furniture, &c. The deed then witnessed that S. A. and H. A. assigned (inter alia) the furniture, plate, pictures, and books to the plaintiffs as a security for 2800*l.* with a power of sale in default of payment, the plaintiffs to hold the proceeds of the sale in trust to pay the expenses, and then to apply the monies in satisfaction of the principal and interest due. The plea then averred, that the plaintiffs sold the furniture &c. and received sufficient to satisfy the principal and interest, which they ought to have applied accordingly.—Replication on equitable grounds, except as to 2085*l.* 18*s.* 4*d.*, parcel of the plaintiff's claim: that the valuation of the plate and furniture was not complete at the time of the execution of the deed, and that they were afterwards valued at 706*l.* 8*s.*, at which sum H. A. agreed to purchase them; that, by an indenture between H. A. and the plaintiffs, after reciting (inter alia) that 2800*l.* and interest was due to the plaintiffs, that S. A. had died, and that, in order to enable H. A. to purchase the plate and furniture, the plaintiffs had agreed to lend him 600*l.*, H. A. assigned to the plaintiffs all the property mentioned in the deed to secure the 2800*l.* and interest, and 600*l.* and interest, together with a power of sale. The replication then stated that the plaintiffs sold the plate and furniture, and, after expenses, realised 1127*l.* 15*s.*, and that there was due under the indenture in respect of the 600*l.* and interest 638*l.* 5*s.* 6*d.*; that H. A. not having paid into the Court of Chancery the 706*l.* 8*s.* for the purchase of the plate and furniture, the plaintiffs, in order to pay the same, retained out of the money realised by the sale 706*l.* 8*s.*; and that the sums of 638*l.* 5*s.* 6*d.* and 706*l.* 8*s.* being deducted from the proceeds of the sale, the plaintiffs never realised more than 2085*l.* 18*s.* 4*d.*, which was only sufficient to pay a part of the plaintiffs' claim in the declaration:—*Held*, that, in taking the account in equity, the plaintiffs were not entitled to deduct from the amount for which the property sold the 600*l.* and interest, for that would in effect be to tack the mortgage of 2800*l.* to the mortgage of 600*l.*, which could not be done since the equity of redemption was in different persons; but that the plaintiffs were entitled to deduct the 706*l.* 8*s.*, since the whole property was not in their possession, and they had no right to sell it until the 706*l.* 8*s.* was paid into Court.

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her executors, &c., or to Henry Arnold, &c., six calendar months before the day to be so appointed.—Averment: that the plaintiffs did by a notice in writing, dated the 28th of January, 1852, and addressed to the defendant as executor of Susannah Arnold, and the said Henry Arnold, and then delivered to the defendant, appoint the 16th of August, 1852, for payment to the plaintiffs of the said sum of 2800*l*.—Breach, nonpayment.

Plea on equitable grounds—That the indenture in the declaration mentioned was and is in the words following:—The plea then set out verbatim the indenture, which recited the will of George Henry Arnold, whereby he bequeathed all his real estates, and (inter alia) all his household goods and furniture, plate, linen, china, pictures, books, &c., and also all his farming stock, implements of husbandry, &c. (subject to the payment of his debts) unto his wife the said Susannah Arnold for life, and, after her decease, to his son, the said Henry Arnold, for his own use and benefit; and the testator appointed Susannah Arnold and Henry Arnold executrix and executor of his will, and died in October, 1854. The indenture then recited, that, by a decree of the Court of Chancery, made in a cause in which Lumley Arnold was plaintiff and Susannah Arnold and Henry Arnold were defendants, and bearing date the 23rd of November, 1850, it was declared, that, according to the true construction of the will of George Henry Arnold, the greater portion of the farming stock and implements of husbandry, by his will directed to be sold for the payment of debts, having been sold, the residue thereof, and the testator's household goods, furniture, and other particulars specifically mentioned in his will, and thereby bequeathed, were, as between the devisees and legatees, liable to the payment of his debts; and it was ordered, that it be referred to the Master to set a value upon the residue of the farming stock and implements of husbandry, furniture, and other articles aforesaid, which were offered to be purchased and

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taken at a valuation by Henry Arnold, and to inquire and state whether it would be fit and proper that the same should be sold to Henry Arnold at such value, or upon any other and what terms; and, if the Master should find that it would be fit and proper, then that the same should be sold to him by the said executors: and it was also ordered that Henry Arnold should pay the proceeds of such sale into the Bank with the privity of the Accountant-General, to be there placed to the credit of the said cause, to an account to be intitled "Account of personal estate of the said testator." The indenture then recited, that, in pursuance of the said decree, a valuation of the testator's books and paintings was made by a competent appraiser, who valued the same at 2050*l.* 15*s.*, at which sum Henry Arnold agreed to become the purchaser thereof. It then recited that the plaintiffs, in order to enable Henry Arnold to comply with the decree of the 23rd of November, 1850, had agreed to lend him the sum of 2050*l.* 15*s.*, and also to lend him the further sum of 749*l.* 5*s.* to supply his other occasions; and that the plaintiffs had agreed to lend him the same upon having the repayment of 2800*l.*, being the aggregate of the said sums, with interest at 5*l.* per cent., secured to them by the joint and several covenant of Susannah Arnold and Henry Arnold, and by a demise of certain hereditaments comprised in the said recited will of George Henry Arnold, and by an assignment of the said books and paintings so purchased by Henry Arnold as aforesaid, and of the household furniture, plate, goods, chattels, and effects bequeathed by the will of George Henry Arnold, &c. The indenture then witnessed, that, in pursuance of the agreement, and in consideration of the sum of 2050*l.* 15*s.* so paid as aforesaid by the plaintiffs, and also in consideration of the further sum of 749*l.* 5*s.* to Henry Arnold paid by the plaintiffs immediately before the execution of those presents, Susannah Arnold and Henry Arnold did thereby covenant with the plaintiffs to pay them the sum of 2800*l.*, &c. (setting out

the covenant declared on). The indenture further witnessed, that Susannah Arnold and Henry Arnold did by those presents grant, bargain, sell, and demise unto the plaintiffs all the messuages, tenements, lands, and hereditaments comprised in and devised by the will of George Henry Arnold; and they did also by those presents assign and transfer unto the plaintiffs all the household furniture, plate, china, pictures, paintings, books, goods, and other chattels and effects then being in the mansion house, subject to a proviso for redemption on payment of 2800*l.* and interest. Then followed a power of sale in case of default in payment; and it was agreed and declared that the plaintiffs should hold the monies to arise from such sale, upon trust, in the first place, to pay the expenses of the sale, and in the next place to apply the monies in satisfaction of the monies owing for principal, interest, or otherwise on the security of those presents, and then to pay the surplus (if any) to Susannah Arnold and Henry Arnold.—The plea then averred, “that, after the commencement of this suit, the plaintiffs, under and by virtue of the said indenture, took possession of all the household furniture, goods, chattels, and effects by the said deed assigned, and sold the same, and thereby realised and received and they now hold more than sufficient of the proceeds of the said sale, after paying and deducting thereout all the expenses incurred in such sale, and otherwise in relation thereto, to pay and satisfy themselves all principal money, interest, and all other monies due to them under or by virtue of the said indenture, and which proceeds they lawfully can and ought to apply in satisfaction of the claim in the declaration mentioned.”

Replication on equitable grounds, except so far as the plea relates to 2085*l.* 18*s.* 4*d.* parcel of the plaintiffs’ claim—That, at the time of the execution of the indenture, the valuation of the plate and furniture was not completed, but the valuation was, after the making of the indenture, and

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before the execution of the deed hereinafter referred to as the indenture made on the 3rd of May, 1851, made in pursuance of the said decree, and amounted to the sum of 706*l.* 8*s.*; at which sum Henry Arnold agreed, under and by virtue of the said decree, to become the purchaser thereof; and Susannah Arnold and Henry Arnold, at the time of the execution of the indenture in the declaration mentioned, had not, nor had either of them, any other property or interest in the said plate and furniture than as in and by the said indenture appears; and Henry Arnold did not become the purchaser of the said plate and furniture, or any part thereof, until after the execution of the said indenture, when he became the purchaser thereof, and entitled to the property in the same under and by virtue of the said decree: that such proceedings were thereupon had in the Court of Chancery, that, afterwards and before the sale in the plea mentioned, the said purchase and sale of the plate and furniture to Henry Arnold was confirmed and made absolute: that afterwards an indenture, under the seal of Henry Arnold, was made between Henry Arnold of the one part, and the plaintiffs of the other part, whereby, after reciting the will of George Henry Arnold and his death, that the will was proved, and the indenture in the declaration mentioned, and that the sum of 2800*l.*, with interest, was due to the plaintiffs, and that the Master to whom the said cause stood referred by his report confirmed the sale to Henry Arnold of the said books and pictures at the sum of 2050*l.* 15*s.*, and that, at the time of the execution of the indenture in the declaration mentioned, the valuation of the said plate and furniture was not completed, but the same had since been made and amounted to 706*l.* 8*s.*, at which sum Henry Arnold had agreed to become the purchaser thereof, and that Susannah Arnold died on the 26th of April then last; and that the plaintiffs, at the request of Henry Arnold, and to enable him to comply with the said decree of the 23rd of November, 1850, as respected the

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plate and furniture, had agreed to lend him the further sum of 600*l.*, upon having the same secured with interest thereon in manner thereafter mentioned: Henry Arnold, by the said deed of 3rd of May, 1851, for securing the payment of the said sum of 600*l.* and interest to the plaintiffs, did covenant, grant, and agree to and with the plaintiffs, that all and singular the manors, messuages, and other hereditaments comprised in the indenture in the declaration mentioned, and thereby demised to the plaintiffs, and also the household furniture, plate, china, pictures, paintings, books, goods, and other chattels and effects assigned to them by the said indenture, should thenceforth be charged and remain a security to the plaintiffs for the payment of the said sum of 600*l.* and interest, and that no part of the same manors and other hereditaments, or of the pictures, furniture, and other articles aforesaid, should be redeemed until payment to the plaintiffs of as well the said sum of 2800*l.* and interest, and the monies secured by the indenture in the declaration mentioned, as of the principal sum of 600*l.*, and the interest thereof. And it was by the deed of the 3rd of May, 1851, agreed and declared between and by Henry Arnold and the plaintiffs, that the power of sale and other the trusts, powers, provisions, and agreements declared and contained in and by the indenture in the declaration mentioned, for securing payment of the said sum of 2800*l.* and interest, should extend and be applicable to the levying, raising, and paying, as well the said sum of 600*l.* and interest, as the said sum of 2800*l.* and interest. Averments—that, after the execution of the deed of the 3rd of May, 1851, and after the time in the deed appointed for payment of the said sum of 600*l.* and interest, the plaintiffs took possession of the said plate and furniture, and sold the same for 1248*l.* 14*s.* 3*d.*, and thereby realised, after paying all expenses, 1127*l.* 15*s.*: that, at the time of the sale of the plate and furniture, and at the time of the appropriation and application hereinafter mentioned, there was due

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and payable from Henry Arnold to the plaintiffs, upon and by virtue of the deed of the 3rd of May, 1851, for and in respect of the said sum of 600*l.* and interest thereon, the sum of 638*l.* 5*s.* 6*d.*: that the plaintiffs appropriated and applied 638*l.* 5*s.* 6*d.*, part of the sum realised by the sale of the plate and furniture, in payment and discharge of the sum of 638*l.* 5*s.* so due and payable by the deed of the 3rd of May, 1851: that, after the execution of the deed of the 3rd of May, 1851, and before the sale of the plate and furniture, notice was given to the solicitor of the plaintiffs, that Henry Arnold had not, as directed by the first-mentioned decree of the High Court of Chancery, paid into the said Bank the sum of 706*l.* 8*s.*, which he had agreed to pay as the purchase-money of the plate and furniture; and, at the time the solicitors of the plaintiffs had the produce of such sale in their hands, they had notice and knowledge that Henry Arnold had not complied with the said decree; whereupon they retained and still do retain the sum of 706*l.* 8*s.*, part of the monies realised by the said sale wholly unappropriated or applied towards, or in part satisfaction of, the plaintiffs' claim in the declaration mentioned: that, after paying and deducting out of the proceeds of the sale in the plea mentioned (the sale of the plate and furniture being a part of the said sale) all the expenses incurred in the sale in the plea mentioned, and the said sum of 638*l.* 5*s.* 6*d.* so applied in satisfaction and discharge of the said sum of 600*l.* and interest and the monies secured by the deed of the 31st of May, 1851, and the sum of 706*l.* 8*s.* so retained as aforesaid by the solicitors of the plaintiffs after such notice as aforesaid, the plaintiffs never had, or realised, or received more than 2085*l.* 14*s.* 8*d.*, which is only sufficient to pay a part of the plaintiffs' claim in the declaration mentioned.

Demurrer; and joinder therein.

The cause came on for trial, before *Pollock*, C. B., at the Middlesex Sittings after Hilary Term, 1855; when a verdict

was entered for the plaintiffs, subject to the opinion of the Court on a special case.

The case stated, in substance, the same facts as appear by the pleadings. It also stated, that, at the time of making the further loan of 600*l.*, Mr. Christmas, who acted as the solicitor of Susannah Arnold and Henry Arnold, received from the plaintiffs' solicitor 550*l.* on account of the 600*l.*, upon his undertaking to pay into Court the amount of the Master's valuation of the plate and furniture (stated in the case to be 736*l.* 8*s.*) when his report of the sale should have been obtained; but he had not done so. In April, 1853, Mr. Christmas paid, out of his own funds, 100*l.* on account of interest due to a specialty creditor of the testator. Another solicitor having been appointed in the place of Mr. Christmas, in June, 1854, it was ordered (amongst other things) that he pay into Court 450*l.*, part of the 550*l.* received by him, credit being given for the 100*l.* paid by him. In July, 1854, a peremptory order, in the same terms, was made, and an attachment issued against him for disobedience of that order, under which he was taken into custody. No part of the 736*l.* 8*s.*, which Henry Arnold agreed to pay for the plate and furniture, had been paid into Court.

The plaintiffs' solicitors, before the sale, had knowledge of the default of Henry Arnold in not having paid the 736*l.* 8*s.* for the plate and furniture; and the plaintiffs, therefore, contend that they are entitled to retain the sum of 736*l.* 8*s.*, part of the monies realised by the sale aforesaid; and the plaintiffs have not applied the said sum of 736*l.* 8*s.*, or any part thereof, towards satisfaction or discharge of the 2800*l.* and interest, secured by the first-mentioned indenture. The defendant denies their right to retain the 736*l.* 8*s.*, and contends that they should apply the same as aforesaid. The plaintiffs sold the books and pictures assigned by the first-mentioned deed in April, 1854, and thereby realised the sum of 2293*l.* 1*s.* 1*d.*, which they ap-

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plied, subject to certain deductions, in part payment of the 2800*l.* and interest.

The defendant contends, that he is entitled, as representing Susannah Arnold, to have the net proceeds of the sale of the books and paintings, plate and furniture, applied in exoneration of the estate of Susannah Arnold, and in discharge of the covenant upon which this action is brought.

If the Court shall be of opinion, that the defendant is entitled to have the produce of the whole property applied in favour of the testatrix, without deducting either of the amounts of 736*l.* 8*s.* and 635*l.* 5*s.* 6*d.*, the verdict for the plaintiffs is to be set aside, and a nonsuit entered.

If the Court shall be of a contrary opinion, their opinion is requested, whether the plaintiffs are entitled to apply and retain both, or either, and which of the said sums, as they contend.

And, also, whether the defendant is entitled to the benefit of the 100*l.*, paid under the circumstances mentioned in the case, and to credit for the 450*l.*, for which Mr. Christmas is in custody. It is agreed that the verdict shall be entered as Mr. *Bartow* shall direct, according to the opinion of the Court on the several questions.

Bramwell (*Prentice* and *Howe* with him) argued for the plaintiffs in last Michaelmas Term (Nov. 19).—The plea sets up as an equitable defence, that the 2800*l.*, which the plaintiffs seek to recover, was lent to Henry Arnold upon the security of an assignment by him and Susannah Arnold (the defendant's testatrix) of certain books and pictures, plate and furniture; and that the plaintiffs sold the same for a sum more than sufficient to pay the 2800*l.* with interest and expenses; so that, upon an account taken in equity, Susannah Arnold, who was a mere surety, would be discharged. The plaintiffs reply by way of equitable replication, admitting that their claim is satisfied to the extent of 2085*l.* 18*s.* 4*d.*; but alleging that, after the loan of

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the 2800*l.*, the plate and furniture was sold to Henry Arnold for 706*l.* 8*s.*, under an order of the Court of Chancery, by which he was required to pay the purchase money into Court; and that, in order to enable him to make the purchase, the plaintiffs lent him a further sum of 600*l.*, upon a security given by him on the whole property, after the death of Susannah Arnold; that the purchase money has never been paid into Court, and there is now due in respect of the 600*l.* and interest 638*l.* 5*s.* 6*d.*, and the plaintiffs claim to set off against the amount realised by the sale of the property the two sums of 638*l.* 5*s.* 6*d.* and 706*l.* 8*s.* The question is, therefore, whether, as against Susannah Arnold, they are in equity entitled to retain those amounts, or either of them. It is submitted, that they are entitled to retain both. First, as to the 638*l.* 5*s.* 6*d.*.—The plaintiffs obtained no title to the plate or furniture under the indenture of the 14th of January, 1850. If Susannah Arnold and Henry Arnold conveyed *proprio jure*, nothing passed; for their interest as legatees was subject to the payment of the debts of the testator, George Henry Arnold; if they conveyed as executors, the plaintiffs, having notice of the trust, were bound by it. Therefore, the only title which the plaintiffs had to the plate and furniture was under the indenture of the 3rd of May, 1851; and since by that alone, so far as regards the plate and furniture, they could realise any money for payment of their debt, they have a right to apply it accordingly. The rule of equity, that a creditor, who, by the sale of property assigned to him, has obtained sufficient to satisfy the debt of the principal, cannot proceed against the surety, only applies where the amount is realised under the security to which the surety is a party, and not where it is obtained aliunde. Here the plaintiffs did not obtain sufficient to satisfy their debt by the sale under the deed declared on. The indenture of the 3rd of May, 1851, was a further security, to the benefit of which the surety is not entitled.—Secondly, the plaintiffs have a

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right to retain the 706*l.* 8*s.* They sold the plate and furniture, with knowledge that Henry Arnold was bound to pay the purchase money into Court and had not done so. The amount of the sale having come to their hands, they are responsible for its due application. As a general rule, a person buying or selling with knowledge of a trust, is bound to see it performed. If the defendant had applied to the Court of Chancery to stay this action by perpetual injunction, the application would not have been granted whilst the plaintiffs were in peril. They have a right to retain the money, in order to exonerate themselves from a liability to answer for a contempt of Court. A further question is raised by the special case, as to the plaintiff's right to retain the sums of 100*l.* and 450*l.*; but that also depends on their rights under the indenture of the 3rd of May, 1851.

Hugh Hill (*Elderton* with him) for the defendant.—A surety is entitled to the benefit of every security on the property of the principal debtor, whether given at the time of the execution of the instrument to which the surety is a party, or afterwards. The argument for the plaintiffs amounts to this—that they have been obliged to lend a further sum of 600*l.*, in order to obtain a valid assignment of the plate and furniture; and that, as they have taken it with notice that Henry Arnold was bound to pay the purchase money into Court, they have not only a claim in respect of the additional loan, but also an equitable lien on the proceeds of the sale to the extent of the sum which ought to have been paid into Court. That is, in effect, claiming as against the surety the 600*l.* The plaintiffs got their title to the plate and furniture under the first deed; the second merely operated as a further charge. That deed gives no new power of sale, but only renders the power contained in the first deed available as to the 600*l.* Since, therefore, the sale took place under the au-

thority conferred by the first deed, the surety is entitled to the benefit of whatever was realised by means of it. The plaintiffs having elected to pay the amount of the purchase money of the plate and furniture to a third person, upon his undertaking to pay it into Court, have no right, as against the surety, to retain an equivalent amount from the proceeds of the sale. It was their duty to have seen that the money was paid into Court.

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Bramwell, in reply, referred to *Scott v. Tyler* (a).

The judgment of the Court was now delivered by

ALDERSON, B.—This was a question on a demurrer to the replication to an equitable plea.

The declaration stated, that, by a certain indenture, dated the 14th of January, 1851, between Susannah Arnold of the first part, Henry Arnold of the second part, the plaintiffs of the third part, Susannah Arnold and Henry Arnold covenanted to pay the plaintiffs 2800*l.*, with 5*l.* per cent. interest, on the 14th of January, 1870, or sooner, upon six months notice. The declaration averred that notice had been given, and that the plaintiffs had not paid in pursuance of their covenant.

The defendant in his plea set out the deed of mortgage in which the covenant was contained, which recited the will of George Henry Arnold, by which he bequeathed certain estates and (inter alia) all his household goods and furniture, plate, linen, china, pictures, books, &c., and also all his farming stock, &c., subject to the payment of his debts, to Susannah Arnold for life, and immediately after her decease to Henry Arnold; and the testator appointed Susannah Arnold and Henry Arnold executor and executrix of his will, and afterwards, in October, 1854, died. The deed

(a) *Dickens*, 72*b.*

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then recited a cause in Chancery, in which Susannah Arnold and Henry Arnold were defendants; and that, in pursuance of the will, certain portions of the property had been sold, and that it was ordered to be referred to the Master to set a value upon the residue of the farming stock, furniture, and other articles aforesaid, which were offered to be purchased and taken at a valuation by Henry Arnold; and the Master was to inquire and state whether it would be proper for the executors of George Henry Arnold's will to sell them at such valuation to Henry Arnold, being one of such executors; and that he should pay the proceeds of such sale into the Bank, to the account of the personal estate of the testator. It then recited that a valuation of the testator's books, &c. had been made at the sum of 2050*l.* 7*s.*, at which sum Henry Arnold agreed to purchase. It then recited that plaintiffs, in order to enable Henry Arnold to pay that sum, had agreed to lend him 2050*l.* 15*s.*, and the further sum of 749*l.* 5*s.* to supply his other occasions; and that the aggregate, being 2800*l.*, should be secured by the joint and several covenants of Susannah Arnold and Henry Arnold, and a demise of the other hereditaments comprised in George Henry Arnold's will. And the indenture witnessed, that, in pursuance of the agreement, Susannah Arnold and Henry Arnold assigned all the lands, &c. to the plaintiffs, together with the personal property, with a power of sale in case of default of payment. And the plaintiffs were to hold the money to arise from such sale, in trust to pay the expenses of such sale, and then the sum of 2800*l.* and interest, and then to pay the surplus to Susannah Arnold and Henry Arnold. The defendant then averred, that, after the commencement of this suit, the plaintiffs, under the said indenture, entered and sold the household furniture, &c. and other personal property, and received sufficient to satisfy all principal money and interest due by virtue of the indenture, and which proceeds they ought to apply in satisfaction of the claims in the declaration.

To this plea, the plaintiffs by way of equitable replication, except so far as relates to 2085*l.* 18*s.* 4*d.*, parcel of the plaintiffs' claim, say that the valuation of part of the personal property, viz. the plate and furniture, at the time of the execution of the said indenture was not completed, but was afterwards made in pursuance of the decree, and amounted to 706*l.* 8*s.*, at which sum Henry Arnold agreed to become the purchaser; and Susannah Arnold and Henry Arnold had no other property or interest in the said plate and furniture except as executors, and as appears from the indenture of the 14th of January, 1851; and that Henry Arnold's purchase was afterwards confirmed in the Court of Chancery; and that afterwards and after Susannah Arnold's death, a certain indenture was made on the 3rd of May, 1851, between Henry Arnold and the plaintiffs, reciting the will of George Henry Arnold and his death, and that his will was proved, and that 2800*l.* and interest was still due; and that the Master in Chancery had confirmed the sale to Henry Arnold of the books and pictures at 2050*l.* 15*s.*; and that at the time of the execution of the first indenture, the valuation of the plate and furniture was not, but had since been, made and amounted to 706*l.* 8*s.*; and that Susannah Arnold had died on the 26th of April, 1851; and that, in order to enable Henry Arnold to comply with the decree as to the purchase of the plate and furniture, the plaintiffs had agreed to lend him 600*l.*: Henry Arnold assigned to plaintiffs (*inter alia*) all the properties contained in the first indenture, to secure the 2800*l.* and interest, and the 600*l.* and interest, together with a power of sale for securing the same. The plaintiffs say that they entered and took possession, and sold the plate and furniture, and realised, after expenses, 1127*l.* 15*s.*, and that there is now due under the indenture of the 3rd of May, 1851, from Henry Arnold to the plaintiffs, for and in respect of 600*l.* and interest, 638*l.* 5*s.* 6*d.* And the plaintiffs further say, that, Henry Arnold not having, as directed by the decree,

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paid into the Court the sum of 706*l.* for the purchase of the plate and furniture, the plaintiffs, in order to pay the same, retained out of the money realised by the sale of the goods, &c. under the first indenture, the sum of 706*l.*; and that the said sum of 638*l.* 5*s.* 6*d.* due under the deed of the 3rd of May, 1851, and the said sum of 706*l.* so retained, being deducted from the proceeds of the sale of the goods under the power of sale in the first indenture, the plaintiffs never had nor realised more than 2085*l.* 18*s.* 4*d.*, which is only sufficient to pay a part of the plaintiffs' claim in the declaration. To this replication the defendant demurred.

Upon the special case, the same questions are in substance raised as upon these pleadings, and the question really is, whether the plaintiffs are entitled to deduct both the sum due under the mortgage of the 3rd of May, 1851, being 638*l.* 5*s.* 6*d.*, as well as the sum of 706*l.* 8*s.* (or 736*l.* 8*s.*, for the pleadings and special case state that amount differently) from the amount, which the property sold under the power of sale contained in the first indenture realised; and we are of opinion that the first of those two sums cannot be deducted as against the present defendant by the plaintiffs. This is, in truth, an attempt to tack the mortgage of 600*l.* to the mortgage of 2800*l.*; but that cannot be done, for the mortgages are made by different persons. The property sold was mortgaged to the plaintiffs by Henry Arnold and Susannah Arnold for 2800*l.*; and the property under the second mortgage is mortgaged to the plaintiffs by Henry Arnold alone, and the tacking of the two securities together depends upon the principle, that the equity of redemption in both belongs to the same person: *White v. Hillacre* (a). Here the equity of redemption belongs to different persons, and in taking the accounts between the plaintiffs and Susannah Arnold, or her executor the defendant, the sum of 2800*l.* alone with interest must

(a) 3 Y. & C. 597.

be liquidated out of the value of the property sold under the power of sale contained in the first indenture. So it would be if the property were in the possession of Susannah Arnold and Henry Arnold, and had been mortgaged by them to the plaintiffs. But then it appears that it was not in their possession till the whole amount was paid into the Court of Chancery by Henry Arnold, on which condition alone the executors were allowed to sell it to him. It appears that he had paid all, except either 706*l.* 8*s.* or 736*l.* 8*s.*; the property, therefore, could not be sold by the plaintiffs under the power of sale until that sum was either paid or secured to the satisfaction of the Court of Chancery. Therefore, the proceeds of the property sold were, in truth, less by this deduction, and the defendant, as representative of Sarah Arnold, can only take credit for the whole amount received under the sale after deducting this sum. In taking the account, therefore, in equity, the plaintiffs are entitled to this allowance.

On taking the whole account, therefore, and deducting the sum of 638*l.* 5*s.* 6*d.*, but allowing either the sum of 706*l.* 8*s.* or 736*l.* 8*s.*, as the case may be, the plaintiffs' replication to the defendant's equitable plea will still be good; for it will still appear that the plaintiffs have not been fully satisfied by the sale. Upon the demurrer, therefore, judgment must be given for the plaintiffs; and the amount of damages in the special case must be, we think, adjusted by Mr. *Barstow* upon the principle above laid down. And our answer to the first question therein referred to us, is, that the defendant should have the net proceeds of the sale (deducting 736*l.* 8*s.* or 706*l.* 8*s.*, as the case may be) applied in exoneration of the estate of Susannah Arnold and in discharge of the covenant on which the action is brought. And secondly, we think that though the sum of 638*l.* 5*s.* 6*d.* is not to be allowed to the plaintiffs in taking the accounts, the verdict for the plaintiffs must nevertheless stand, as some amount is still due to them.

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The special case further raises a question as to a sum of 100*l.* paid to Messrs. Goldney & Fellows, and a sum of 450*l.*, for which Mr. Christmas is in custody. But we think, that, these sums having relation only to the 600*l.* mortgage, the defendant is clearly not entitled to any deduction in respect of either of them. These sums could only be material if we were taking the account between Henry Arnold and the plaintiffs. The verdict will stand for the plaintiffs for the sum to be adjusted by Mr. *Barstow* in accordance with our opinion.

Judgment for the plaintiffs on the demurrer:
 the accounts to be adjusted accordingly.

Jan. 12.

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A landowner has a right to appropriate surface water which flows over his land in no definite channel, although the water is thereby prevented from reaching a watercourse which it previously supplied.

Therefore, where the plaintiff's mill, for more than fifty years, had been worked by the stream

of a brook, which was supplied by the water of a pond filled by rain, a shallow well supplied by subterraneous water, a swamp, and a well formed by a stream springing out of the side of a hill, the waters of all which occasionally overflowed and ran down the defendant's land in no definite channel into the brook:—*Held*, that the plaintiff had no right, as against the defendant, to the natural flow of any of the waters.

THE first count of the declaration stated, that the plaintiff was possessed of a mill, and by reason thereof was entitled to the flow of the streams of certain springs flowing in a northerly direction on the westerly side of the farm house and buildings of a farm called Petty Royds, for the working of the said mill; and also to the natural flow of subterraneous water into and out of the ground of the said springs, for the feeding of the said springs and streams for the working of the said mill; which springs the plaintiff describes as springs arising out of the ground within the distance of eighty yards from the said farm house. And the defendant by making a drain in Petty Royds farm, near to the said springs respectively, and near to and on the

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south side of the said farm house, and extending both towards the west and towards the east of the said house, diverted large quantities of the water of the said streams away from the said mill, and intercepted and diverted divers quantities of the subterraneous water from naturally flowing into and out of the ground at the said springs, and so diverted the same from the said mill.—Second count: that the plaintiff was possessed of the said mill, and, by reason thereof, was entitled to the flow of a stream flowing in an easterly direction on the easterly side of the said farm house and buildings for working the same mill, which stream the plaintiff describes as a stream commencing with a spring arising out of the ground within the distance of eighty yards from the said farm house. And the defendant, by making a drain extending in an easterly direction from the said spring, and in great part along the course of the said stream, and, where not in the actual site of the said stream, being near thereto and deeper than the said stream, and by cutting a drain from the southern side of the said drain and extending in a south-easterly direction therefrom through a ridge of land, diverted the water thereof away from the said mill.

Pleas (inter alia).—First, not guilty: Thirdly to the first first count: that the plaintiff, by reason of his possession of the said mill, was not entitled to the flow of the streams of the springs in that count mentioned, flowing as therein mentioned, for the working of the same mill; nor to the natural flow of the subterraneous water in that count mentioned, into and out of the ground at the said spring in that count mentioned, for the feeding of the said spring and streams for the working of the said mill, modo et formâ, &c. Fifthly to second count: that the plaintiff, by reason of his possession of the mill in that count mentioned, was not entitled to the said flow of the said stream in that count mentioned, flowing as therein mentioned, for working

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the said mill, modo et formâ, &c.—Upon which issues were joined (a).

The cause came on for trial at the Yorkshire Summer Assizes, 1853, when a verdict was entered for the plaintiff by consent, subject to a special case, to be settled by an arbitrator, and which (so far as material) is as follows:—

The plaintiff is the owner and occupier of a mill at Clough Bottom, in the township of Longwood, in the parish of Huddersfield. It has existed as a mill for fifty years, and is situate upon a natural stream called Longwood Brook, the waters of which have, during all that time, been used by the occupiers of the mill for working the mill by water power, and carrying on in it the business of a manufacturer of woollen cloths.

The Longwood Brook flows along the bottom of a valley, which is bounded by a range of hill on the north or north-west side thereof, and by another range of hill, called Nettleton Hill, on the south or south-east thereof. This last-mentioned range of hill ends with a deep slope close to the north-west side of the two reservoirs of the Huddersfield Waterworks. This slope is much broken by landslips, more particularly on the north and east sides of it. Two of these landslips, which are below the highest level of the hill, are known by the names of Pendle Hill and Pighill Wood.

The defendant Atkinson is the occupier of a farm in the said township, called Petty Royds farm, on the north-west side of the range called Nettleton Hill. The defendant Dr. Ramsbotham is the receiver and manager of that estate for the owner, who is an infant ward in Chancery.

The natural state of the surface of Petty Royds farm is

(a) There were also pleas justifying the abstraction of the water, under the provisions of the Huddersfield Waterworks Acts, 7 & 8 Geo. 4, c. lxxxiv.,

and 8 & 9 Vict. c. lxx.; but the question arising on those pleas was abandoned by the defendants' counsel on the argument.

very uneven, and has much needed draining. Parts of it had been partially, but imperfectly, drained by the tenants, before making the drain which led to the present action. In some of the closes lodgments of water and boggy places had existed, and horses when crossing over the close called Longbottom had sunk in. The farm of Petty Royds is chiefly used as a dairy-farm, in which the tenant kept about sixteen head of cattle.

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From the sides of the hills called Pighill Wood and Pendle Hill, which lie to the west of Petty Royds farm buildings, the natural flow of water is northward, until it reaches the Longwood Brook; and all water passing over the lands which lie on the west side of the farm buildings naturally flows northward into that brook. Above Pighill Wood is an area of about six acres and a half, which is formed into a shallow basin by the landlips which have occurred on the face of this hill, and the waters collected in this basin, if they ever exceed the depth of about three feet above the surface of the lowest point of the basin, will escape down the north-east corner and then northward to the Longwood Brook, on the west of the Petty Royds farm buildings. All the water which does not exceed the depth of three feet passes away into the ground. If the waters which so escape in excess of the above amount are very abundant at one time, a part could then find a passage to the east of their point of escape and run down the field called the Longbottom.

Near the north-east corner of this basin there is an elevated portion of land, on part of which the farm buildings stand projecting from the hill side, and which advances to the north from the general slopes of the hill above these farm buildings. This elevated portion of land divides the natural flow of water on the west of the buildings from the natural flow of water on the east of them, which is to the eastward down Longbottom close and under some steep landlips called Dock Holes and Elmhurst Wood.

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On the west side of the farm buildings there formerly existed a well of water distant seventy yards from the farm house. This well was supplied by a subterraneous flow of water out of the ground, and from it the farm house was supplied with water. The well was about two feet deep and about one yard broad and wide. In seasons of a great supply of water there was an overflow from this well, which ran northward to the Longwood Brook. The water of this well the former occupants of the farm and of the neighbouring cottages used for domestic purposes as spring water.

Adjoining the south side of this well was a swamp, extending over an area of about sixteen perches, occasioned by a slight elevation of the surface towards the north, which obstructed the escape of any water which had once found its way there. This swamp communicated with the water of the well, and was never entirely free from water at any season of the year. The supply of water to the farm house for the use of the tenant and his family and servants was wholly dependant on this well, which at no season was ever dry, although its level lowered in dry weather. At a distance of about sixteen yards to the south of this well, on the other side of the swamp and more under the slope called Pendle Hill, were also formerly two wells called the horse-wells.

At the upper end of the close called Longbottom, where it adjoins the farm yard and buildings of Petty Royds, there formerly existed a well, which was distant fifty-six yards and two feet towards the east from the door of the farm house. This well, which was two feet deep below the surface of the ground and about three feet square, was supplied from the water which arose out of the ground on the hill side near that spot. This well was used as the watering place for the cattle of the farm, and the supply from it in dry seasons being greatly reduced in quantity, the cattle had then to go on their knees to get it. With the over-

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flow of this well commenced a stream of water which, for part of its course, ran in an open ditch down the hedge-side on the south of Longbottom close, and in other parts down a small channel worked by the water, and over swampy places where the cattle had trodden in the soil.

After this stream of water left Longbottom close, it ran directly eastward over the close called Lower Woods, from thence along a natural valley in an easterly direction, and through the fence which divides the close called Lower Woods from the close called Top Field. From this fence it passed to the north-east, across the north-west corner of Top Field, and leaving that close it went eastward down by the hedge sides, and passing the houses at Leys it discharged itself, before and up to the construction of the Mill-owners Compensation Reservoir (a), into the Longwood Brook, and since the first construction of that reservoir, until the times &c., it discharged itself into the Mill-owners Compensation Reservoir in Longwood.

When a sudden flood of rain was discharged into the course above described, the water of this stream overflowed its channel at the point where it passed through the fence on the east side of Lower Woods and entered the close called Top Field, and the water so overflowing escaped partly over that and other closes and entered the Mill-owners Compensation Reservoir at its most southern angle or point.

Some time previous to 1851 the defendant Atkinson had partially drained portions of Longbottom, and in that year he applied to Dr. Ramsbotham to have a main drain cut for the purpose of carrying off the water from the upper portion of that close, and improving this part of the farm.

(a) This is a reservoir made by the Commissioners of the Huddersfield Waterworks, in pursuance of the 7 & 8 Geo. 4, c. lxxxiv. s. 21, for the purpose of

collecting therein, for the benefit of the mill owners, the waters of the Longwood Brook above the dam of the reservoir.

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Dr. Ramsbotham gave Atkinson authority to make the drain. Atkinson began the drain in August, 1852. The drain was commenced at the point in the course of the stream above described, where it passes out of Lower Woods through the fence into Top Field, and follows that course upwards through Lower Woods in the natural valley, and passes under Elmhurst Wood into Longbottom, taking the same direction as that of the stream under the hedge-side for a distance of 112 yards in that close, and then passes under that hedge into the close called Dock Holes. In Dock Holes it runs parallel to and along the side of this same hedge, and generally in the direction of the stream, until it reaches the point where the well on the east of the farm buildings formerly existed at the top of Longbottom. Three stone watering troughs are now fixed near the place of the well, and that well has been levelled and filled up. Atkinson afterwards cut the drain in a western direction and made it pass on the south side of the farm buildings, by carrying it through the elevated ground before described on which these buildings stand, and passing thence under the slopes on the west side of the farm buildings, which are called Pighill Wood, it reached a point in its course which is eighty-eight yards to the west of the barn end of the farm buildings.

Atkinson's object in continuing the drain to the west of the stone watering places was to carry water from the west side of the farm buildings for the supply of those watering places on the east of them, and was not intended by him for agricultural purposes. The drain was subsequently continued by Atkinson further to the west under the slopes of Pendle Hill to a distance of about 198 yards, and was completed to this extent in March, 1853.

The drain from the spot occupied by the stone watering places east of Petty Royds farm yard down Duck Holes and Longbottom and through Lower Woods is a good and useful agricultural drain, for the purpose of relieving the

ground and subsoil of those closes of lodgments of water and swamps, which in parts extended to a great depth, as it will serve as a master drain into which collateral drains can find an outlet for more completely draining these parts of the farm of Petty Royda.

The effect produced by the part of the drain which is carried from the stone troughs to the west through the elevated ground upon the natural flow of the streams of water which escaped to the northward into Longwood Brook from the well on the west side of the farm house, is to divert the water of the streams and to intercept the water which before ran into and under ground there near this well and was there discharged northwards, and to carry these waters away down to the east by the south side of the farm house. The surface of the swamp near the well on the west side of the farm buildings, as it existed before the cutting of the drain, has been filled in and raised, and the well itself has been filled up and levelled and does not now exist.

The effect of the drain east of the farm buildings and of the said conduit leading from it to the new stone reservoir, is to carry off the water which, before the drain was cut, ran down the course of the stream through Longbottom, and to discharge part of it into that reservoir, and part of it down to Leys and to the Mill-owners Compensation Reservoir.

The question for the opinion of the Court on each issue is, whether the plaintiff is entitled to retain the verdict thereon, or, whether such verdict ought to be entered for the defendants: and the verdict is to be retained or entered accordingly.

Knowles (*R. Hall* and *Pickering* with him) argued for the plaintiff in last Michaelmas Term (Nov. 12).—The plaintiff is entitled to retain the verdict on both counts. For fifty years prior to the diversion complained of, the plaintiff's mill had been worked by the water of Longwood Brook.

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That brook was supplied by three sources of water on the west of the defendant's farm buildings, viz. the basin of six acres and a half, the well supplied by subterraneous water, and the swamp. The diversion of those sources of water forms the subject of the first count of the declaration. It is found as a fact, that from the west side of the farm buildings the natural flow of water was northward until it reached Longwood Brook. Then, what is there to interfere with the plaintiff's right to the water? [*Alderson*, B.—*Arkwright v. Gell* (a) decided that a person acquires no right to an artificial watercourse, where, from the nature of the case, it is obvious that the enjoyment depended on temporary circumstances.] There the flow of water was produced by the draining of a mine, and the party who worked it was clearly not bound to work at the same level so as to keep up the supply of water; here the plaintiff does not seek to impose on the defendant any servitude. The basin is not an artificial watercourse, but a natural lake, the waters of which, when they exceed a certain depth, run over and flow to the brook. So, when the subterraneous water of the well has flowed above ground, it does not differ from a natural watercourse. It is conceded, that the defendant is under no obligation to keep up the brickwork of the well. [*Pollock*, C. B.—Suppose a person made an artesian well, the waters of which flowed over, and, after running for some distance, found their way into a watercourse which was used by the occupier of the adjoining land, could not the former discontinue the well?] Twenty years enjoyment of the flow of water would give a right to it. [*Alderson*, B.—Before this well was made the land was not subject to any burthen: it is now sought to prevent the defendant from using his land as he used it before, by imposing on it the burthen of letting the water pass.] Another source by

(a) 5 M. & W. 203.

which Longwood Brook was supplied was the well on the east side of the farm buildings. The water of that well arose out of the ground on the hill side. *Dickenson v. The Grand Junction Railway Company* (a) shews that an action will lie for the obstruction of water which percolates under ground, and which would in its natural course have formed part of a river. There *Pollock, C. B.*, in delivering the judgment of the Court, says, "If the course of a subterraneous stream were well known, as is the case with many, which sink under ground, pursue for a short time a subterraneous course, and then emerge again, it never could be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground. When, however, the springs come to the surface and form streams and rivers, the established rules apply, that each riparian owner is entitled, not to the property in the flowing water, but the usufruct of its stream for all reasonable purposes, to drink, to water his cattle, or to turn his mills, according to the nature and situation of the stream." [*Parke, B.*—That case only decided, that, if a person has a right to a stream *jure naturæ*, he has a right to its subterranean course. In *Wood v. Waud* (b) this Court held, that the right to artificial watercourses, as against the party creating them, depends on the character of the watercourse, whether it be of a permanent or a temporary nature, and upon the circumstances under which it was created.] *Race v. Ward* (c) shews that a person may by enjoyment acquire a right to the water of a well. [*Parke, B.*—There the question was, whether the right to use the water was a profit a prendre; and the Court held that it was an easement.] *Embrey v. Owen* (d) will, perhaps, be

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(a) 7 Exch. 282.

(c) 4 E. & B. 702.

(b) 3 Exch. 748.

(d) 6 Exch. 353.

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relied on by the defendants. But in that case the water, which was diverted for the purpose of irrigation, was returned into the stream, so that the quantity abstracted was inappreciable, and caused no damage. In America, a very liberal use of streams is allowed for the purposes of agriculture and manufacture; but, nevertheless, the just and equitable principle of the Roman law prevails: *Sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat*: 3 Kent, Com. 441, nota.—He also argued, that the defendant was not justified in diverting the water, under the Huddersfield Water Works Acts, 7 & 8 Geo. 4, c. lxxxix. and 8 & 9 Vict. c. lxx.

Cowling (Watson with him) for the defendants.—The action is not maintainable. It is material to consider what would have been the rights of the parties before the well on the west of the farm buildings was made. If there had been merely a stream springing up in the land of the defendant Atkinson, and which did not run in any defined channel, but spread itself over the surface, until at length it found its way into Longwood Brook, would the plaintiff have had any natural right that the water should always flow in that course? It is submitted that he would not, because in that case the land would be no more than a water-shed. It is clear that, if the water fell from the clouds, and then spread itself over the defendant's land until it reached the brook, the plaintiff could not compel the defendant to allow the water always to flow over his land. All land which is not a dead level must be more or less a water-shed. Can it then make any difference that the water, instead of falling from the clouds, springs from the ground. If the water flows in no defined channel, it is immaterial, in point of law, whether it comes from above or below. Any other view will lead to this consequence, that, where flowing water is spread over a large field in no defined channel, the owner could not narrow the stream; for it is clear that a defined channel cannot be narrowed; since that would cause the water

to flow with greater force, and perhaps injure the neighbouring lands. Again, the plaintiff would have a right to the underground feeders, for a stream which runs in a defined channel underground cannot be lawfully diverted: *Dickinson v. The Grand Junction Railway Company* (a). Those considerations shew that there can be no natural right to water which runs on the surface in no defined channel, and that the landowner may divert it, or use it for any purpose he thinks fit. It follows then, that there has been no enjoyment by the plaintiff of this water "as of right," and therefore he has not acquired a right to it by lapse of time: *Greatrex v. Hayward* (b). But even if the plaintiff has a natural right to the water, that is subject to the right of the defendant to use it for the cultivation or improvement of his farm. *Rawston v. Taylor* (c) is an express authority that the owner of land has an unqualified right to drain it for agricultural purposes, in order to get rid of mere surface water, the supply of the water being casual, and its flow following no regular or definite course; and a neighbouring proprietor cannot complain that he is thereby deprived of such water, which otherwise would have come to his land. Then, applying those principles to the present case, the defendants are entitled to succeed on the first count. The plaintiff can have no right as against the defendants to the water of the basin. With regard to the well, it is supplied by subterraneous water, which occasionally overflowed in no definite channel and found its way to the brook. That could give the plaintiff no right to the water, for the well was formed for the domestic use of the occupants of the defendant's farm. The swamp is not distinguishable from the basin. With respect to the well on the east, it does not distinctly appear where the supply came from, but it was only occasional. Moreover, it is found that the drain was made for agricultural pur-

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(a) 7 Exch. 282.

(b) 8 Exch. 291.

(c) Ante, p. 369.

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poses, and that it was beneficial for those purposes. [Parke, B.—That question is not raised by the pleadings.] —He admitted that the defendant was not justified in abstracting the water under the provisions of the Huddersfield Waterworks Acts.

Knowles replied.

Cur. adv. vult.

The judgment of the Court was delivered by

ALDERSON, B.—In this case we have been relieved from the consideration of the several pleas justifying the abstraction of the water under the provisions of the Huddersfield Waterworks Acts, by the admission very properly made by Mr. *Cowling* on this argument, that he could not support them; and the questions are now reduced to this one alone, whether the defendant Atkinson has improperly diverted, by the acts which he has undoubtedly done, four sources of water which have, as the plaintiff contends, supplied the Longwood Brook on which his mill is situated. There are three of these included in the first count of the declaration, namely, a pond of six and a half acres, a swamp of about sixteen perches, and a well. The fourth is a well, included in the second count. There is no doubt that in the course of the drainage these sources of water have been diverted, and now fall into the drain made by the defendant. The arbitrator describes them thus: “And, first, as to the six and a half acre pond,” he says, “from the sides of the hill called Pighill Wood and Pendle Hill the natural flow of water is northward till it reaches Longwood Brook, and all water passing over the lands there naturally runs down towards and into Longwood Brook. Above Pighill Wood a shallow basin is formed by the land slips which have from time to time occurred, and the water collected in it, if it exceeds the depth of about three feet above the lowest point of the basin, escapes northward and runs down over the surface of the hill towards Longwood Brook. The rest sinks into the

ground or remains as a pond in the hollow thus naturally created by the form of the land." Now, we think that this water, both that which overflows and that which sinks in, belongs absolutely to the defendant on whose land it arises, and is not affected by any right of the plaintiff. The right to the natural flow of the water in Longwood Brook undoubtedly belongs to the plaintiff; but we think that this right cannot extend further than a right to the flow in the brook itself, and to the water flowing in some defined natural channel, either subterranean or on the surface, communicating directly with the brook itself. No doubt, all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please and appropriating it. He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such a channel. In this case a basin is formed in his land, which belongs to him, and the water from the heavens lodges there. There is here no water-course at all. If this water exceeds a certain depth it escapes at the lowest point, and squanders itself (so to speak) over the adjoining surface. The owner of the soil has clearly a right to drain this shallow pond and to get rid of the inconvenience at his own pleasure. We have no doubt, therefore, that, as to this source of feeding the Longwood Brook, the plaintiff has no title. The same may be said of the swamp of sixteen perches, which is merely like a sponge fixed (so to speak) on the side of the hill, and full of water. If this overflows it creates a sort of marshy margin adjoining; and there is apparently no course of water, either into or out of it, on the surface of the land. As to the subterranean courses communicating with this swamp, which must no doubt exist, it is sufficient to say, that they

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are not traceable, so as to shew that the water passing along them ever reaches Longwood Brook. This falls, therefore, into the same category, or rather is a stronger instance of the rule before mentioned. The well at this point is also in simili casu. It is not found in the case that it has any subterraneous communication with Longwood Brook. Indeed, if it had any such communication (inasmuch as the brook seems far below the bottom of this shallow well), the communication would probably draw off all the water in it. It is sufficient, however, to say, that it is not found so to communicate. But no doubt, when this well overflows, the overflow pours itself over and down the declivity towards the brook. But this gives no right to the water, as we have already shewn in the case of the six and a half acre pond. These are the three grounds of the plaintiff's complaint in the first count of his declaration. They all seem to us to fail.

We come now to the second count. The stream here said to be diverted is one in which, on the side of a hill, a stream wells out from the ground at a depth of about two feet, and is received into a basin of about three feet square, and used as a watering place for cattle. This stream in dry seasons was somewhat scanty, so as to compel the cattle at those periods to go down on their knees to reach it. At other times it overflowed its basin, and then it ran down part of the way in an open and, as we presume, artificial ditch, for it is described as a ditch beside a hedge. The water lower in its course flows on in a small channel worked by the water and over swampy places where the cattle had trodden in the soil. Still lower down, after passing through one or two fields, it arrives in what is described as a natural valley, and after this it would have probably communicated with Longwood Brook, but for its diversion into the Mill Owners' Compensation Reservoir, which is in fact the same thing.

There is here also, we think, nothing found to take the water from this well out of the same class as the three

former cases. We must consider the stream in its beginning, not after it has arrived in the natural valley communicating with the reservoir. If the water, after having arrived there, had been then diverted, the case would be different. The water falling from heaven on the side of a hill, we have before said, may be appropriated, though not after it has once arrived at a defined natural watercourse; and here the question is, whether this water in its first origin, and before it has arrived at any definite natural watercourse conveying it onwards towards Longwood Brook, has not been intercepted by the defendant's drain, and so appropriated by him; and we think it has. For what are the facts? The water in dispute is only the overflow of a well, and the well is now prevented from overflowing. But when before it did overflow it run into a ditch (the lowest adjoining ground) made artificially, and for a different purpose, running beside a hedge. This was no natural defined watercourse. After this, it squandered itself over a swamp made by the feet of cattle treading about, and it is not till long after this, that what still remained of it found its way into what may there perhaps be correctly called a definite natural watercourse, receiving this and probably other water from other sources also. This part of the case, we think, is wholly undistinguishable from, and is governed by the decision of this Court in, the late case of *Rawstron v. Taylor (a)*.

This complaint, therefore, fails also. The result is (without going into any question as to this being done by the defendant Atkinson in the rightful exercise of his power of draining his own lands, which probably the pleadings do not raise), that the plaintiff has failed to establish any right to the natural flow of these four streams of water, or any of them, and that on this part of the case our judgment must be for the defendants.

Judgment for the defendants.

(a) Ante, p. 369.

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Jan. 16. **OAKLEY v. THE PORTSMOUTH AND RYDE STEAM PACKET COMPANY.**

The defendants, who were common carriers, contracted with the plaintiff to carry his goods between Gosport and Ryde. The goods were put in a boat, and towed by a steam vessel of the defendants, which proceeded to Portsmouth pier to take in passengers.

There was another vessel of the defendants' alongside the pier; and it was the usual and most safe course for the steam boat so approaching to stop until the other vessel had left. On this occasion the steam boat with the boat in tow was twice stopped, in consequence of the stopping of the other vessel, and on the second time of stopping the tide lifted up the tow-boat and pitched it on the rudder of the steam-boat, whereby the tow-boat sprung a leak, and the plaintiff's goods were damaged. There was no negligence on the part of the captains of either vessel—*Held*, that the damage was not caused by the act of God; and therefore the defendants were liable.

THIS was an appeal against the decision of the Judge of the County Court of Hampshire holden at Portsmouth.

The action was brought to recover 29*l.* 12*s.* 6*d.*, for damage done to certain goods and merchandise of the plaintiff in a boat belonging to the defendants, under the following circumstances:—

The plaintiff is a railway carrier living in the Isle of Wight. The defendants run their packets between Portsmouth and Ryde. The plaintiff had a contract with the defendants, who are common carriers, for the conveyance of his goods and parcels in the horse or tow-boats of the defendants between Gosport and Ryde. The goods damaged were, on the 31st October, 1853, put in a boat of the defendants', which was taken in tow by a steamer belonging to the defendants, called the "Prince of Wales."

The damage complained of occurred on that day. It was a boisterous day; a good deal of sea was running; a strong ebb tide was running out of Portsmouth harbour against the wind. The "Prince of Wales," with the plaintiff's boat in tow, as usual, was going out of Portsmouth harbour from Gosport towards Victoria Pier at Portsmouth, where the vessels always stop to take in passengers. Another steamer, the "Princess Royal," (also belonging to the defendants), which had just arrived from Ryde, was along-side the pier. As the most convenient practice, the steam-boat approaching the pier usually stopped until the other had left the pier. On this occasion the "Prince of Wales," with the boat in tow, was stopped twice in consequence of the steamer at the pier being stopped after she had been started. On the

of the steam-boat, whereby the tow-boat sprung a leak, and the plaintiff's goods were damaged. There was no negligence on the part of the captains of either vessel—*Held*, that the damage was not caused by the act of God; and therefore the defendants were liable.

stopping of the "Prince of Wales" the second time, the tide lifted up the towed boat and pitched it on the rudder of the "Prince of Wales," and stove in some of the bottom timbers of the towed boat, and thus sprung a leak in the towed boat, which was let go and got to shore as speedily as possible, and some of the goods were found to be damaged.

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The course taken by the captain of the "Prince of Wales" in stopping his vessel was not taken to avoid a collision with the other vessel at the pier, but as the usual, and, in his judgment, a safe course to reach the pier on the other vessel leaving it. If the "Prince of Wales" had continued in motion, the towed boat would not have been thrown on the rudder nor the damage done; but the "Prince of Wales" would have lost a good deal of time, and the state of the wind and tide might have swamped the towed boat if the "Prince of Wales" had, from the point where the steamer was observed to be at the pier, gone further out to sea. The men in the towed boat used every effort to fend her off the vessel. The "Prince of Wales" was stationary when the boat struck against the rudder. There was nothing unusual in the state of the wind or tide, nor anything therein that was not known to the captain of the "Prince of Wales" at the time he started from Gosport; to whom it was also known that the "Princess Royal" would probably be at the Portsmouth pier when he arrived off it. There was no negligence, in fact, on the part of the captain of the "Prince of Wales," or on the part of the captain of the "Princess Royal."

On the part of the defendants it was contended, that, under the above circumstances, they were not liable for the damage done to the plaintiff's goods (a). The judge of the county court decided that the plaintiff was entitled to recover.

(a) It was also contended that the defendants did not carry the plaintiff's goods as common carriers, but on the terms contained in certain letters set out in the case; but this point was not argued.

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The point for the consideration of the Court is, whether, under the circumstances before stated, the damages are recoverable from the defendants.

Hayes for the appellants.—The defendants are not liable, inasmuch as the damage was caused by the act of God. The responsibility of a carrier was considered in *Forward v. Pittard* (a), where Lord *Mansfield*, in delivering the judgment of the Court, says, "By the common law, a carrier is in the nature of an *insurer*. It is laid down that he is liable for every accident except the act of God or the King's enemies. Now what is the act of God? I consider it to mean something in opposition to the act of man: for everything is the act of God that happens by his permission; everything by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shews it was done by the King's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempest." Again, in the case of *The Company of the Trent Navigation v. Wood* (b), Lord *Mansfield* said, "By the act of God is meant a natural, not merely an inevitable accident." [Alderson, B.—Suppose a person is taken to a hospital where an infectious disease prevails, and he catches it, would that be the act of God?] There the injury might have been avoided: here the damage would not have arisen but for the wind and waves. [Martin, B.—Suppose on a stormy day the wind drove one vessel against another without any negligence of the captains of either vessel, would that be the act of God?] It would, since it was an accident arising from natural causes. In *Amies v. Stevens* (c), the defendant's hoy loaded with the plaintiff's goods, in coming

(a) 1 T. R. 27.

in 1 T. R. 28.

(b) E. T. 25 Geo. 3, B. R., cited

(c) 1 Str. 127.

through a bridge, was driven by a sudden gust of wind against it, and sunk in consequence of a shock, which a stronger vessel might have sustained without sinking. *Pratt, C. J.*, "held the defendant not answerable, the damage being occasioned by the act of God. For though the defendant ought not to have ventured to shoot the bridge, if the general bent of the weather had been tempestuous, yet this, being only a sudden gust of wind, had entirely differed the case; and no carrier is obliged to have a new carriage for every journey." In *Abbott on Shipping*, p. 314, 9th edit., it is said, "The expression 'act of God' denotes natural accidents, such as lightning, earthquake, and tempest, and not accidents arising from the negligence of man." A similar definition is given in *Story on Bailments*, § 523; and amongst other instances, reference is made to a case of *Colt v. M'Mechen (a)*, where a vessel was beating up the Hudson against a light and variable wind, and being near shore and while changing her tack, the wind suddenly failed, in consequence of which she ran aground and sunk; and that was held a loss by the act of God. [*Martin, B.*—The case finds that there was nothing unusual in the state of the wind or tide.] Weather which would not be tempestuous for one vessel might be tempestuous for another. Again, at what particular point does a tempest begin? The true criterion is, whether the damage has arisen from natural causes and without any negligence on the part of the carrier. [*Alderson, B.*—Suppose a carrier was passing a powder mill and it blew up, or was going over a bridge and it fell down, and thereby the goods were damaged, would he not be liable?]

W. H. Cooke for the respondent.—A carrier is responsible for the loss or injury of the goods intrusted to him, although there is no negligence on his part. In *Richards v. The London & Brighton &c. Railway Company (b)*,

(a) 6 John's R. 160.

(b) 7 C. B. 858.

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Wilde, C. J., says, "The duty of common carriers, by the common law, is perfectly well understood: it is a warranty safely and securely to carry; whether they be guilty of negligence or not, is immaterial; the warranty is broken by the nonconveyance or nondelivery of the goods intrusted to them." *Smith v. Shepherd* (a) is a conclusive authority that in this case the damage did not arise from the act of God. That was an action against the master of a vessel navigating the river Ouse and Humber from Selby to Hull. At the trial it appeared that at the entrance of the harbour at Hull there was a bank on which vessels used to lie with safety, but of which a part had been swept away by a great flood some short time before the misfortune in question, so that it had become perfectly steep instead of shelving towards the river. A few days after this flood, a vessel sunk by getting on this bank, and her mast, which was carried away, was suffered to float in the river, tied to some part of the vessel. The defendant's vessel, upon sailing into the harbour, struck against the mast, which, not giving way, forced the defendant's vessel towards the bank, where she struck and would have remained safe had the bank been in its former situation; but on the tide's ebbing, her stern sunk into the water and the plaintiff's goods were spoiled. The defendant tendered evidence to shew that there had been no actual negligence; but *Heath*, J., rejected it, and ruled that the act of God which could excuse the defendant must be *immediate*, but this was too remote: and that ruling was approved of by the Court. Here the immediate cause of the damage was the act of the party in stopping the vessel. There was no tempest nor anything unusual in the state of the wind or tide.—He was then stopped by the Court.

ALDERSON, B.—We are all satisfied that this damage did not arise from the act of God.

(a) Cited in *Abbott on Shipping*, p. 315, 9th edit.

MARTIN, B.—The act of God means something overwhelming, and not merely an accidental circumstance. Here the rising of the waves dashed the boat on the rudder of the steam-vessel, but that was caused by the stopping of the steam-vessel.

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PLATT, B., concurred.

Appeal dismissed.

THE GUARDIANS OF THE POOR OF THE BELFORD
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DECLARATION on a bond of the defendant, in the sum of 500*l.*, subject to a condition, whereby, after reciting that one P. Navin had been appointed treasurer for the Belford Union, it was declared, that if the said treasurer should from time to time and at all times during his continuance in the said office, faithfully discharge the duties thereof by receiving all monies tendered to be paid to the plaintiffs and placing the same to their credit, by paying out of the monies in his hands of the plaintiffs all orders on him drawn on their behalf and duly signed and countersigned, by keeping and rendering to the guardians and regularly submitting to the auditors an account of all monies received and paid by him as such treasurer, &c., then the said obligation should be void. Averments—That P. The defendant as surety became bound to the guardians of a poor law union by bond, conditioned (inter alia), that the treasurer of the union should discharge the duties of his office “by receiving all monies tendered to be paid to the board of guardians, &c., by paying out of the monies in his hands of the guardians all orders on him drawn on their behalf,” and that he should pay over to the guardians all *balances*, monies, &c. due to the union. The treasurer, who was a cornfactor, had extensive dealings in corn and open accounts in trade with the overseers of several of the townships. No money was received from these townships, but it was the practice of the treasurer to debit the overseers in his trade account with the amount of the poor rate ordered by the guardians to be paid; and then to debit himself with the amount as paid to him as treasurer. His accounts were audited half-yearly, and the credits in corn were allowed by the auditors as payments in money. At the last audit the auditors found that 23*sh.* 1*s.* 10*d.* was due from him to the guardians:—*Held*, that the defendant was liable for that amount, inasmuch as it was a “balance” ascertained and settled by the auditors.

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Navin continued to hold the office of treasurer for the said Union from the time when the bond was made until the 15th January, 1855, when he was removed from the office: that P. Navin, during the time he so filled the office of treasurer for the said union, received large sums of money as such treasurer: that, at the time of such removal and from thence hitherto, P. Navin had and still has in his custody, possession, or power, a large sum of money, to wit, 239*l.* 1*s.* 10*d.*, belonging and due to the said union. First Breach—That P. Navin has not, nor has any other person, accounted for or paid over to the plaintiffs, or to any person appointed by them or the Poor Law Commissioners, the said sum of money or any part thereof. Third Breach—That before P. Navin was removed from his said office, and during the time when he filled the same, and at a time when he had money of the plaintiffs and money belonging to the said union in his hands sufficient to meet all the orders drawn upon him by and on behalf of the plaintiffs, including the orders next hereinafter mentioned, certain orders were duly drawn upon him as such treasurer by and on behalf of the plaintiffs, and such orders were duly signed and countersigned and presented to the said P. Navin for payment: that the said P. Navin did not and would not pay the said orders or any of them, or any part thereof, and the said orders never have been paid by the said P. Navin.

Pleas (inter alia) to first breach.—First, that, at the time the said P. Navin was removed from the said office of treasurer of the said union, he had not, as such treasurer, nor has he, in his custody, possession, or power, any sum of money belonging to the said union as alleged. Secondly, that P. Navin did, on removal from the said office of treasurer, account for and pay over to the plaintiffs, or to the persons appointed by them in that behalf, the said sum of money in the said first breach mentioned, according to the condition of the bond. To third breach—That, at the time

when the said orders, so drawn, signed, and countersigned, were presented to the said P. Navin as such treasurer for payment, he had not in his hands as such treasurer any money of the plaintiffs or money belonging to the union sufficient to meet such orders, or any or either of them, or any part thereof as alleged.

At the trial, before *Platt*, B., at the last Newcastle Assizes, it appeared that, in the year 1848, P. Navin was appointed treasurer of the Belford Union, which office he continued to hold until the 15th of January, 1855, when he was removed by order of the Poor Law Commissioners. On the 8th of October, 1850, the defendant, as his surety, executed a bond conditioned (as far as material) as follows:—

“Now the condition of the above-written obligation is such, if the above-named treasurer shall, from time to time and at all times during his continuance in the said office, diligently and faithfully discharge the duties thereof by receiving all monies tendered to be paid to the board of guardians, and placing the same to their credit; by paying out of the monies in his hands of the guardians all orders on him drawn on their behalf, and duly signed and countersigned; by keeping and rendering to the guardians, and regularly submitting to the auditors, an account of all monies received and paid by him as such treasurer; by obeying the lawful directions of the said guardians; and in the above and all other respects and particulars well and truly observing, fulfilling, and keeping all the rules, orders, and regulations of the Poor Law Commissioners in force for the time being, so far as the same extend or apply to the said office or the duties thereof: And if, on resigning or being removed from the said office, or at any time when thereunto required by the said guardians or Poor Law Commissioners by notice to him given during his continuance in the said office, the above-named treasurer shall account for, hand over, and pay over to the said guardians, or to such person as the Poor Law Commissioners may ap-

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point, all such books and papers, balances, monies, matters, and things belonging, due, or relating to the said union, or any parishes or parish therein, or to the said guardians, or to any of the officers of the said union or any parish therein, which shall be in his custody, possession, or power, in virtue of the said office or otherwise howsoever, without loss, abatement, fraud, deceit, or concealment, then the above-written obligation shall be void."

It was the duty of P. Navin, as such treasurer, to receive from the overseers of the various townships within the Union, the monies which they were, from time to time, directed by the guardians to pay over to him for the relief of the poor of the townships, and out of the sums so received to pay orders for money drawn upon him by the guardians. P. Navin, who carried on the business of a miller and cornfactor, had extensive dealings in corn and open accounts in trade with the overseers of several of the townships, who were farmers. No money was received from these townships, but it was the practice of P. Navin to debit the overseers in his trade account with the amount of poor rate ordered by the guardians to be paid, and then to debit himself with the amount as paid to him as treasurer. The accounts of P. Navin were audited every half-year, as required by the Poor Law Amendment Act, 7 & 8 Vict. c. 101, s. 38, and the credits in corn were allowed by the auditors as payments in money. At the last audit, when P. Navin ceased to be treasurer, there was due from him, on account of rates received in corn and money since the defendant became surety, a balance of 239*l.* 1*s.* 10*d.*, but the credits for corn received during that period amounted to 94*l.*

It was objected on behalf of the defendant, that, under the above circumstances, no monies were received by P. Navin beyond what he paid over to the board of guardians, so as to render the defendant, who was a surety, liable. The learned Judge directed a verdict for the plaintiff for 239*l.* 1*s.* 10*d.*,

reserving leave to the defendant to move to enter a verdict for him.

Watson, in the following Term, obtained a rule nisi accordingly; against which

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Knowles (*Manisty* with him) now shewed cause.—The payment of the rates by the delivery of corn was in effect a payment of money, since the corn was accepted by the treasurer and allowed in account by the Poor Law Auditors as money. It is true, that an agent has, in general, no authority to receive payment otherwise than in money; but if he receives a check or goods, and that mode of payment is ratified by his principal, the debtor is discharged: *Underwood v. Nicholls* (a), *Howard v. Chapman* (b). By the terms of the bond, the treasurer was bound to pay over all balances due from him on removal from office, and at the last audit a balance of 239*l.* 1*s.* 10*d.* was found to be due. It is immaterial whether that is recovered as an ascertained balance or as money received.

The Court then called on

Watson and *Unthank* to support the rule.—The whole question turns upon the bond itself. The treasurer was not a collector, and the sureties are not responsible for him in that capacity. By the terms of the condition, he merely undertook to receive “all monies tendered to be paid to the board of guardians,” to pay “out of the monies in his hands of the guardians all orders on him drawn on their behalf,” and to hand over to the guardians “all balances, monies,” &c., that is, the balances of monies received. There has been no breach of those conditions. The audit does not bind the sureties. They are only sureties for

(a) 17 C. B. 239.

(b) 4 C. & P. 508.

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money received. If the treasurer had requested the auditors to allow as money received a sum which was not in fact paid, and they had done so, that would not have bound the sureties. Or suppose the auditors and board of guardians had agreed to receive all the rates in corn, though that might be conclusive, as against themselves, of payment, it would not affect the sureties. [*Alderson, B.*—The duty of the auditors was not only to take an account of sums which the treasurer had received and paid, but also to see whether they had been received and paid. Still the defendant undertook that the treasurer should pay over all "*balances*," and the auditors have found that there was a balance.] An agent has in general no authority to receive payment otherwise than in money. The treasurer may be estopped, because he has the power of appealing against the finding of the auditors, but the sureties have no such power. The object of the audit is to see that the guardians do not misapply the money. The auditors only ascertain that the treasurer has in his hands the quota of the different parishes. There is no evidence that the guardians assented to this audit. If it be conclusive, the sureties would be bound by the finding of the auditors, whether correct or not. But suppose a mistake in the account of 500*l.*, either accidental or through the misrepresentation of the treasurer, would the sureties be concluded by it? The treasurer was the agent of the guardians to receive the rates in cash, not in corn; and the overseers who have paid in corn are still liable to be compelled by distress to pay the rates, and therefore they are not due from the treasurer. The guardians cannot proceed against the sureties in respect of the amounts for which they have a remedy against the overseers, and therefore those items must be struck out of the account. [*Alderson, B.*—The sureties have undertaken that the treasurer shall pay over all balances—that is, balances found by the auditors, whether right or wrong.] As against the sureties, the bond should be

strictly construed; and it does not say, balances "found by the auditors."

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ALDERSON, B.—The rule must be discharged. With reference to poor law accounts, there are two kinds of audit, one by the guardians themselves, to audit the accounts of the parish, the other by the Poor Law Commissioners, to audit the accounts of the union or district. The account in question was audited by auditors appointed by the Poor Law Commissioners. Now the question is, what did the sureties for the treasurer undertake? They undertook, first, that he should do his duty "by receiving all monies tendered to be paid to the board of guardians," and "by paying out of the monies in his hands of the guardians all orders on him drawn on their behalf." That means that he is to receive the rates in cash, because he is to pay in cash; and it was a breach of duty to receive payment in any other way. The auditors ought not to have allowed the overseers, as payments, the monies due from the treasurer to them for corn; and if the auditors had done their duty there would have been no question. But what has the defendant guaranteed? He has undertaken that the treasurer shall pay over to the guardians all balances, monies, &c., due to the union. The question then is, what are the balances due to the union? Now the treasurer was bound to receive monies from the overseers of the respective parishes, and pay over the balances due, those balances to be settled by certain auditors appointed by the Poor Law Commissioners. Then the balances are the balances due in the course of the practice of the office which the treasurer held, that is, such as are allowed at the audit. When, therefore, the accounts were audited, the treasurer was bound to pay over the balance which the auditors found to be due, or, if he was dissatisfied with the allowance, he should have appealed. The auditors have found that 239*l.* 1*s.* 10*d.* is due, and the defendant by this bond has undertaken to pay if the treasurer does not.

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MARTIN, B.—The ruling of my Brother *Platt* was perfectly correct. The question depends on the meaning of the word “balances” in the condition of the bond. It appears that the treasurer, being a corn merchant, was in the habit of receiving corn from the overseers and debiting himself with it as a debt, and so receiving payment of the sums due from the overseers for rates. I concur with Mr. *Watson* that that is not *money* received, though the transaction might amount to payment; and if this bond were solely in respect of money received, I should say that the defendant is not liable. But the condition is not only that the treasurer shall receive monies tendered, and pay out of monies in his hands orders drawn on him, but also that he shall hand over all *balances* due. If the treasurer had been sued on this bond, could any one doubt that the balance found by the auditors would be the balance for which he was responsible. It is attempted to put a different construction on the bond in respect of the sureties, but that cannot be done. The true balance is that ascertained by the auditors to be due. I agree that if there had been a mistake in auditing the accounts, the sureties would not be responsible; but when the treasurer paid for the corn by debiting himself with the amount as so much money received, as between him and the guardians the account was perfectly correct, for by that means he got money into his hands. It is true that the 239*l.* 1*s.* 10*d.* is not made up of monies actually received, but of monies and corn; but the surety is responsible for that amount, because it is the balance found to be due by the auditors.

PLATT, B., concurred.

Rule discharged.

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BELL, Public Officer of THE NATIONAL PROVISIONAL BANK OF ENGLAND, *v.* BUCKLEY and Others. *Jan. 17 & 18.*

DECLARATION on a bill of exchange, drawn the 17th of January, 1854, by I. Thornley upon, and accepted by the defendants, for payment of 365*l.* three months after date, and indorsed by Thornley to the plaintiffs.

Plea—That the bill of exchange was accepted by the defendants for the accommodation of the drawer, I. Thornley, and without consideration to the defendants for the acceptance or payment thereof; and that I. Thornley indorsed the bill to the said copartnership; and that, before action, and upon maturity of the said bill, and at the place for presentment thereof for payment, I. Thornley paid the amount of the bill and of all claim thereon to the then holders of the bill, to wit, the said copartnership, and thereby then satisfied and discharged the said bill, and all claims thereon, whether against the defendants or any other person, by payment to the said holders; and the said holders accepted and received such payment in such satisfaction and discharge.

Replication—The plaintiff takes and joins issue upon the plea.

At the trial, before *Crowder, J.*, at the last Liverpool Assizes, it appeared that I. Thornley, the drawer of the bill, kept an account with the National and Provincial Bank of England, at Manchester. The bill (which it was suggested was an accommodation bill), was sent by Thornley to the bank, who discounted it, and placed the amount to

T. kept an account at a bank, who discounted for him a bill for 365*l.*, drawn by him upon, and accepted by, the defendant. The day before the bill became due T. went to the bank, who held another bill of his for 370*l.*, due that day, and requested the manager to "retire" the two bills by discounting two others of similar amounts. The manager consented, and T. gave him a bill for 365*l.*, purporting to be accepted by the defendant, to "retire" the bill of that amount. The bank discounted the second bill for 365*l.*, and placed the proceeds to the credit of T., minus the discount, and they got

back from their London agent the first bill for 365*l.*, with the acceptance cancelled. Several thousand pounds had been subsequently paid by T. into the bank. It afterwards turned out that the acceptance of the second bill for 365*l.* was forged by T. In an action by the bank against the defendant, as acceptor of the first bill:—*Held*, that the facts did not support a plea of payment of the bill by T.

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his credit, minus the discount. On the 19th of April, being the day before the bill became due, Thornley came to the bank, who held another bill of his for 370*l.*, due that day, and proposed to the manager of the bank that they should "retire" the two bills by discounting two other bills of similar amounts. The manager consented, and Thornley gave him a bill for 365*l.*, purporting to be accepted by the defendants, to retire the bill on which this action was brought, and another bill for 370*l.* to "retire" the other bill. The bank discounted these bills, and placed the proceeds to Thornley's credit. On that occasion Thornley gave to the manager of the bank an order in writing, which, after setting out a description of the bill on which this action is brought, proceeded thus:—"National Provincial Bank of England.—Please order payment of the above, and charge to account of Isaac Thornley. Manchester, 19th April, 1854." On the same day the manager of the bank wrote to their London correspondents, "The London and Westminster Bank," to whom the bill had been sent in the ordinary course of business, requesting them to "retire" the bill; and it was returned to the bank at Manchester with the acceptor's name struck out. It was afterwards found that the acceptance of the bill for 365*l.*, which was given to retire the bill on which this action was brought, was forged by Thornley, who became bankrupt and absconded. It appeared from Thornley's pass-book, that several thousand pounds had been paid by him into the bank between the 19th of April and the 4th of July, when his account closed; but, on the ultimate balance, he was indebted to the bank in 683*l.*

It was submitted, on the part of the plaintiff, that the above facts did not amount to a payment of the bill by Thornley. The learned Judge was of that opinion, and a verdict was entered for the plaintiff for the amount of the bill and interest, leave being reserved to the defendants to move to enter a verdict for them.

Knowles, in the following Term, obtained a rule nisi accordingly; against which

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Manisty shewed cause.—First, the transaction on the 19th of April did not amount to payment of the bill in question by Thornley. He gave to the manager of the bank a piece of paper, which he represented was a valid bill of exchange, and, upon the faith of that representation, the manager consented to discount it, and “retire” the other bill. That was a fraud upon the bank, and immediately they discovered it they had a right to avoid the contract. If a person induces another by a fraudulent representation to withdraw a bill from circulation, a third party cannot take advantage of the fraud. It is clear that if Thornley had been sued on this bill he could not have successfully pleaded payment. Then, how can the defendant set it up? Suppose Thornley had merely asked the manager of the bank to discount the forged bill, and he had consented, and had given Thornley the proceeds, could not the bank have recovered back the money as soon as they discovered the fraud? The meaning of the term “retire,” in reference to a bill of exchange, was considered in *Elsam v. Denny* (a), where it was held, that, if an indorsee “retires” a bill, he merely withdraws it from circulation in so far as he himself is concerned, and may hold it with the same remedies as he would have had if he had been called upon in due course, and had paid the amount to his immediate indorsee.—Secondly, it is said that the bill has been paid, by reason of monies having been subsequently paid into the bank by Thornley; but there is no evidence of an appropriation of any of the monies in discharge of this bill.—He then referred to the pass-book.

Knowles, *Atherton*, and *Milward*, in support of the rule.—The order given by Thornley to the bank, at the time they

(a) 15 C. B. 87.

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agreed to retire the bill, shews that they considered the transaction as a payment. By that order, the bank became agents of Thornley for the purpose of paying the bill; and accordingly, by their direction, their London agents returned it to them cancelled. The payment was then complete. This being an accommodation bill, the drawer is in effect the acceptor, and there has been a payment by him. It is true that the acceptance of the other bill was forged, but when the bank discounted it, the transaction was the same as if they had placed the money in the hands of Thornley, and he had returned it to them in payment of this bill. In *Elsam v. Denny (a)*, *Jervis, C. J.*, in delivering the judgment of the Court, says, "If an acceptor 'retires' a bill at maturity he takes it entirely from circulation, and the bill is in effect paid." [*Martin, B.*—That is said in reference to a *bonâ fide* bill.] Here the manager of the bank believed that the paper which Thornley gave him would be the means of bringing money to pay the bill, but it turned out to be a forgery. Then immediately that was discovered there was no payment. It is clear that Thornley could not rely on the forged bill as payment. As against the defendant, who is a mere surety, the transaction amounts to payment: if not, he will be seriously prejudiced, inasmuch as, if the bank had not treated the bill as paid by Thornley, the defendant would have been called upon to pay it, and might have recovered the amount from Thornley whilst he was solvent. In considering the liability of the defendant, the transaction must be looked at without reference to the discovery of the forgery. The argument, that the defendant is liable because the bank took the bill upon the faith of its being a genuine instrument, whereas it was a forgery, would equally apply if the bank had received a bill accepted by a party who was represented to be solvent, but who afterwards became insol-

(a) 15 C. B. 87.

vent. Thornley could not rely on the transaction as payment, because a person cannot avail himself of his own fraud; but that consideration does not affect the defendant. Moreover, the whole of this bill was not paid by the forged acceptance, for the amount of the substituted bill was the same, and the latter was carried to Thornley's account, minus the discount; so that to that extent the bill in question was paid with the money of Thornley.—Secondly, there was an appropriation of the monies subsequently paid into the bank by Thornley in payment of this bill: *Clayton's case* (a). [*Martin*, B.—The principle of *Clayton's case* shews that here there was no payment. *Simson v. Ingham* (b) is also an authority to that effect.]—He then referred to the entries in the pass-book, as shewing that sums paid into the bank at particular times operated as a payment.

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ALDERSON, B.—The rule must be discharged. The only question is, whether the defendant has made out that this bill was paid by Thornley. It appears, that, the day before the bill became due, Thornley came to the bank, and, there being another bill of his due that day, he requested the manager to “retire” those bills by discounting two other bills which he brought with him. The manager consented; and for the purpose of retiring the bill for which this action is brought, Thornley gave to the manager a bill for the same amount, and apparently between the same parties, the present defendant being supposed to be the acceptor. It turned out, however, that it was a bill upon which no action could be maintained against the defendant, since the acceptance was a forgery. The transaction is simply this: the bank take up the bills, and charge in account with Thornley the amount which the discount would have been if it had been discounted by a third person, and they give him credit for the amount of the forged bill minus the discount. That is no payment of the other bill. Then it is suggested, on the

(a) 1 Meriv. 572.

(b) 2 B. & C. 65.

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authority of *Clayton's case*, that inasmuch as Thornley paid monies into the bank after the bill was due, they must be taken as paid in discharge of that bill. But where there is an account on the one side of sums owing and on the other of sums paid, there is no presumption that the items of payment are in respect of the items owing: -it depends on the fact of actual appropriation.

PLATT, B.—I am of the same opinion. In order to retire the other bill, the bank discount the forged bill, and give Thornley credit for the amount minus the discount. That is no payment of the former bill, but a mere substitution of one bill for another for the purpose of giving the debtor an ulterior day of payment.

MARTIN, B.—I am of the same opinion. The case when understood is perfectly plain. It is an action against the acceptor of a bill of exchange: the plea states that it was accepted for the accommodation of Thornley, and it goes on to allege that Thornley paid the amount. The defendant must therefore establish that fact. Then, what is payment of a bill? It is argued that the delivery of one bill to "retire" another is payment; in one sense it may be, but the meaning of payment in this plea is an equivalent amount of money given by the debtor to the creditor in satisfaction of his claim on the bill. Then what are the facts? The day before the bill becomes due, Thornley goes to the manager of the bank and induces him to take up the bill, by giving him another bill which turns out to have a forged acceptance. That is no payment. Suppose Thornley had said to the manager of the bank, "A. B. owes me a sum of money, and here is a document by which he admits the debt, take it and get the money and pay the bill which you hold of mine;" that the manager assented, but, on going to A. B., found that the document was a forgery, could it for one moment be contended that there was any pay-

ment of the bill? That, however, is this identical case, the only difference being, that here the manager of the bank agreed to accept a document not payable immediately, but at the expiration of three months. Then it is said that the case is one of hardship on the defendant who is a mere surety; but assuming that the plaintiff was bound to consider him other than the principal debtor, even if this had been an action not upon the bill itself, but against him as a surety, I think that he would have had no defence. It is also said, that it is a case of hardship, because the defendant, not having been called upon, would naturally suppose that the bill was paid. But a person being under the idea that a bill is discharged when it is not in fact discharged, nevertheless remains liable. According to my view of the case, there is not a scintilla of evidence of payment of the bill in the sense in which that term is used in the plea: the entries in the bank books are nothing more than a mode of keeping the accounts by debits and credits.

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Rule discharged.

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The fact of a person being the registered owner of a ship is not of itself evidence that the master has authority to bind him by contracts for necessities supplied to the ship; but it must be shewn that the master is his agent for that purpose.

Therefore, where a ship sailed for a foreign port, the master having a power of attorney from the owner, and whilst the ship was at the port the defendant purchased it:—*Held*, that he did not thereby become liable for necessities supplied to the ship by order of the master.

ACTION for money lent and money paid.—Plea: never indebted.

At the trial, before *Martin, B.*, at the London Sittings after last Trinity Term, the following facts appeared:—On the 23rd of May, 1853, the barque “Arabian” sailed from Bristol on a voyage to Melbourne, and thence to Bombay and London. At that time one Woodbridge was the registered owner of the vessel. On the 25th of January, 1854, Woodbridge sold the vessel to the defendant, who was duly registered as the owner. The defendant continued to be the owner of the vessel until the 25th of May in the same year, when he sold it to one Wood. The vessel arrived at Melbourne in September, 1853, and remained there until the 7th of February, 1854. Whilst the vessel was at Melbourne, the captain, who had a power of attorney from Woodbridge, borrowed of the plaintiff, who was the agent of Woodbridge, money, with which he purchased meat, flour, and other necessities for the vessel; and the plaintiff also, at the captain’s request, paid the pilotage outwards. The action was brought to recover from the defendant the money so lent and paid during the time he was owner of the vessel.

It was submitted, on the part of the defendant, that, under the above circumstances, he was not liable. The learned Judge directed a verdict for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit.

Watson, in the following Term, obtained a rule nisi accordingly; against which

C. Pollock now shewed cause.—The question is, whether the owner of a vessel is liable for necessities supplied to it in a foreign port by order of the master, but without the authority or knowledge of the owner. It is submitted, that

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he is. The master has an implied authority to pledge the credit of the owner for necessities; and, in the absence of proof to the contrary, it must be presumed that the contract was made on his behalf. [*Martin, B.*—Suppose the ship had been carried away by a pirate, would the owner be liable for necessities ordered by him.] If, instead of the owner being changed, the master had been changed without the knowledge of the owner, the latter would have been bound by all acts of the new master within the scope of his authority as master. Where a vessel, whose master and officers had been murdered in a mutiny, came into a foreign port, and the British consul took possession of her, appointed a master, and procured the funds for refitting the vessel by executing a bottomry bond, the Court of Admiralty pronounced the bond valid: *The Cynthia* (a). In the case of *The Eliza Cornish* (b), the sale of the vessel by the master was held invalid, because there was no necessity to sell it. The law is thus stated in *Abbott on Shipping*, p. 108, 9th ed.: "As the master in general appears to all the world as the agent of the owners in matters relating to the usual employment of the ship, so does he also in matters relating to the means of employing the ship; the business of fitting out, victualling, and manning the ship being left wholly to his management in places where the owners do not reside, and have no established agent, and frequently also even in the place of their own residence. His character and situation furnish presumptive evidence of authority from the owners to act for them in these cases." [*Martin, B.*—There the master is spoken of as the recognised agent of the owner.] When a person purchases a ship he impliedly adopts the master. In the case of repairs ordered by the captain within the scope of his authority as master, either he or the owner of the vessel may be sued. In *Frost v. Oliver* (c), Lord Camp-

(a) 16 Jur. 748.

(b) 17 Jur. 738.

(c) 2 E. & B. 311.

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bell, C. J. (referring to the observation of Lord *Tenterden* (a), that, after the passing of the Register Acts, the leaning of Courts of law in the construction of them was, to say that the registered owners of ships should at all events be liable for the repairs), says, "He was instrumental in overturning that doctrine; but he never intimated an opinion that ownership was to be disregarded in questions of liability for repairs, or that owners could not be considered liable unless under a contract personally entered into by themselves, or by a master whom they have themselves actually appointed. I apprehend that such a doctrine would open a wide door to fraud, and would lead to very injurious consequences in this country." [*Martin*, B.—If the real facts of that case be looked at, it will be seen that it turned on the question of agency.]

Watson and *Joyce* appeared in support of the rule, but were not called upon to argue.

PLATT, B. (b)—The rule must be absolute. If the defendant had appointed the master, he would undoubtedly have been liable, since the goods were ordered by the master, and were necessary for the vessel. But the master was appointed by Woodbridge, who, whilst the vessel was on its voyage to Melbourne, sold it to the defendant. Then, what opportunity had the defendant of making any choice of the master; and how can it for one moment be presumed that the master was his agent? It is argued, that the owner of a vessel is de facto liable for necessities supplied by order of the master. There is no case in which the law is so laid down. It is true that in *Frost v. Oliver* (c), Lord Campbell expressed an opinion that legal ownership was *prima facie* evidence of liability; and so it may be, unless the

(a) Ry. & M. 43.

of Appeal.

(b) *Pollock*, C.B., and *Alderson*,

(c) 2 E. & B. 311.

B., were in the Criminal Court

credit is shewn to have been given to some other person. Here the master was not the agent of the defendant. The case of *Frost v. Oliver* is different, because there the defendant was the registered owner of the vessel; and although the master was not appointed by him, but by the person to whom he had agreed to sell the vessel, yet the appointment was with his privity; and there were circumstances from which the jury might infer that the goods were supplied on the credit of the defendant.

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MARTIN, B.—I am also of opinion that the rule ought to be absolute. It appears, that, in May, 1853, the barque "Arabian" sailed from this country on a voyage to Melbourne. At that time one Woodbridge was the registered owner of the vessel, and the master proceeded on the voyage, with a power of attorney to act for him. There was nothing to shew that the power of attorney was not in full force at the time the goods were ordered by the master; and the circumstance of the vessel being afterwards sold by Woodbridge would not discharge him from liability for contracts made under that power of attorney. It is argued, that the defendant has adopted the master: there is, however, no evidence of that, but simply that he became owner of the vessel. Therefore, the question depends on whether, by the mere transfer of a ship to a purchaser, he becomes liable to contracts made by the master without his authority or knowledge. The true doctrine is that laid down by the Court of Exchequer Chamber in *Mitcheson v. Oliver*(a), viz. that questions of this kind depend on the contract, and not on the ownership of the vessel; and that it is necessary to shew an agency between the master and the party sought to be charged. It is true, that the common law of England differs from that of other nations, inasmuch as a person who supplies necessaries to a ship has no lien on the ship itself,

(a) 5 E. & B. 419.

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but only a remedy by action against the person of his debtor. But under this law the shipping interest of this country has prospered, whilst the power of attaching and selling a vessel for goods supplied to it has been and is attended with considerable inconvenience. In this case there is nothing to shew that the master was the *agent* of the defendant in the sense in which the law recognises an agency, viz. the power of one person to bind another by his acts.

Rule absolute.



Jan. 18.

GREAVES v. LEGG and Another.

The defendant, a London merchant, employed a broker at Liverpool to purchase some wool. The broker negotiated a sale by the plaintiff to the defendant of certain bales deliverable at Odessa, "the names of the vessels to be declared as soon as the wools were shipped." In

DECLARATION (a) on a written agreement whereby the plaintiff agreed to sell to the defendants a quantity of wool.—Breach, that the defendants would not accept or pay for the wool.

Plea.—That the name of the vessel on board of which the wool was shipped was not declared, according to the terms of the alleged contract, as soon as the wool was so shipped.—Issue thereon.

At the trial, before *Crowder, J.*, at the last Liverpool Assizes, it appeared, that, in May, 1853, the defendants, who were London merchants, employed Messrs. Hughes &

this transaction the broker acted for both plaintiff and defendant. By the custom of Liverpool, where a contract contained a stipulation that notice of an event should be given by the vendor to the vendee, it was usual for the vendor to give the notice to the broker, who communicated it to the vendee:—*Held*, that the defendant was bound by such usage, and therefore that a notice by the plaintiff to the broker of the names of the vessels in which the wools were shipped was a performance of that stipulation, although the broker omitted to communicate them to the vendee.

(a) The declaration is fully set out in the report of this case 9 Exch. 709.

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Ronald, brokers, at Liverpool, to purchase for them some wool. Messrs. Hughes & Ronald negotiated with the plaintiff for the sale to the defendant of "about 300 to 350 bales white washed Donskey fleece wool to arrive, at 10½d. per pound, laid down either at Liverpool, Hull, or London, deliverable at Odessa during August then next, old style, to be shipped with all despatch, of fair average quality, &c., the names of the vessels to be declared as soon as the wools were shipped." In this transaction Messrs. Hughes & Ronald acted as brokers for both the plaintiff and defendants. As soon as the wool was shipped, the plaintiff communicated to Messrs. Hughes & Ronald the name of the vessel in which it was shipped; but they omitted to give the defendants notice of the shipment until some time afterwards. Several witnesses were called, who stated, that, where a contract contained a stipulation that notice of any event should be given by the vendor to the vendee, it was the custom for the vendor to give the notice to the broker, and that they had never known an instance in which the broker had neglected to communicate it to the vendee. The defendants' counsel admitted that it was the usage at Liverpool, when a contract of this kind was made by one broker between seller and buyer, for the seller to make the declaration of the shipment to the broker; and that such declaration was made, according to the usage, to Messrs. Hughes & Ronald.

It was submitted, on the part of the plaintiff, that notice to the broker was notice to the seller. On the part of the defendants it was contended, that the broker merely received the notice as agent of the vendor; and that, if he did not give notice to the vendees, it was a breach of his duty towards the vendor. A verdict was then entered for the plaintiff for 500*l.*, leave being reserved to the defendants to move to enter a verdict for them, if upon the above admissions the Court should think them entitled to do so:—the Court

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to draw any inference which, upon the evidence and admissions, they may think a jury ought to have drawn.

Hugh Hill, in the following Term, obtained a rule nisi accordingly; against which

Knowles and *Blackburn* now shewed cause.—The plaintiff is entitled to retain the verdict. Notice of the shipment has been given according to the usage at Liverpool; and that is sufficient. It is not suggested that the usage is unreasonable. It will be argued that the usage does not apply, because the defendants are London merchants; but when they employed a broker at Liverpool to make the contract, they impliedly authorised him to make it subject to all usages affecting contracts at that place.—The Court then called on

Kemplay (*Hugh Hill* with him) to support the rule.—First, the broker was not the agent of the defendants to receive the notice, but only the agent of the plaintiff to forward it. A broker who acts for both vendor and vendee is their agent solely for the purpose of making the contract. In *Blackburn on Contracts*, p. 81, it is laid down, that a broker is the agent for both parties for one common object, viz. for putting into writing the terms of the contract. He has no authority by virtue of his office to receive payment or do anything else relating to the contract. Whether he has been authorised is a question to be proved. Here there was no evidence that the broker was the agent of the defendants to receive the notice.—Secondly, the defendants, who are London merchants, are not bound by a usage which prevails at Liverpool, and of which it does not appear that they had any knowledge.

ALDERSON, B.—The rule must be discharged. The question is, whether, when a vendor and vendee employ the

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same broker to make a contract, which requires that a declaration of a particular fact shall be made by the vendor to the vendee, it is sufficient to make the declaration according to the usage of the place where the contract was made. I am of opinion that it is. It has been argued that the broker is the agent for the vendor only in respect of those things to be done by the vendor; and that he is not the agent of the vendee in respect of anything to be done to him. Now, the act to be done, viz. the declaring the name of the vessel in which the wool is shipped, is of some advantage to the vendee; and therefore, as it is a benefit to him that it should be done, I should say that the intermediate broker must be his agent to receive the information for him. But the question is, what is the meaning of the terms of this contract? It is silent as to the mode in which the declaration is to be made, and therefore it must be interpreted according to the usage of the place where it was made. By the usage of Liverpool, where one broker acts for both parties, the declaration is to be made to him, and he is to communicate it to the vendee. Here the declaration has been made by the vendor to the broker, but he has delayed giving notice to the vendee. Then is the custom unlawful? That is not suggested; it is only said, that the custom is not binding on the defendants, because they are London merchants. But if a London merchant chooses to make a contract at Liverpool, he is bound by usages affecting contracts made at that place, the same as when he makes a contract in London he is bound by the customs of London. That point was considered in the case of *Cuthbert v. Cumming* (a), where it was held that a contract to load at Trinidad a full and complete cargo of sugar and molasses meant a full and complete cargo according to the custom of that place, viz. sugar in hogsheads and molasses in puncheons.

(a) 11 Exch. 405.

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PLATT, B.—I am of the same opinion.

MARTIN, B.—I am of the same opinion. This Court held (a) that the stipulation in the contract, that the names of the vessels should be declared as soon as the wools were shipped, was a condition precedent to the defendants' obligation to accept and pay for them, and the parties went to try that fact. Several witnesses stated that the custom of Liverpool was, that the notice should be given by the vendor to the broker, and that they had never known an instance in which the broker had not done his duty in forwarding it to the vendee. Therefore, taking the evidence together with the admissions, the usage at Liverpool was proved and the notice was given according to it. It has been argued, that a broker's authority ceases when he has signed the contract. In many cases that may be so. The passage cited from Blackburn on Contracts is perfectly correct; but in reality there are many brokers in Liverpool whose duty extends far beyond that of making the contract, and who in fact transact the whole business. Then is the usage illegal? There is no pretence for saying so. Then it is contended, that, because the defendants resided in London they are not bound by it; but where a person employs a broker to do business for him at a particular place, he must be taken to have contracted according to the custom of that place. *Cuthbert v. Cumming* is a conclusive authority to that effect.

Rule discharged.

(a) 9 Exch. 709.

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STRACHAN and Others, Assignees of OVERBURY, a Bankrupt, v. BARTON.

Jan. 25.

TROVER for a bill of exchange.—Pleas: Not guilty and not possessed; upon which issues were joined.

At the trial, before *Wightman, J.*, at the last Surrey Assizes, it appeared that the plaintiffs were the assignees of one Overbury, a bankrupt, who had carried on the business of a cloth manufacturer at Woolton-under-Edge, in Surrey. In November, 1855, the bankrupt was under acceptances to a large amount, which he was unable to meet. The defendant had supplied the bankrupt with goods on credit, and on the 13th of November the defendant came to the bankrupt and asked him for cash on account. The bankrupt told him he had none. The defendant then said that his demands for cash were urgent, and he pressed the bankrupt to give him something he could negotiate for cash. The bankrupt thereupon gave him the bill in question. At that time the credit for the goods had not expired. On the 22nd of December the bankrupt filed a declaration of insolvency, upon which a fiat issued.

Payment by a trader, who contemplates bankruptcy, of a debt not then due, upon a *bonâ fide* request of the creditor, is not in law a voluntary payment; the fact of the debt not being due is merely a circumstance for the jury in considering the question of fraudulent preference.

The learned Judge directed the jury in conformity with the law as laid down in the case of *Brown v. Kempton (a)*; and his Lordship left it to them to say whether the payment was both voluntary and in contemplation of bankruptcy. The jury found that the bankrupt contemplated bankruptcy, but that he gave the bill in consequence of the urgency of the defendant for payment; and thereupon a verdict was found for the defendant.

Bramwell, in the following Term, obtained a rule nisi for a new trial, on the ground of misdirection; against which

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Petersdorff now shewed cause.—The finding of the jury is conclusive. The fact of the debt not being due is merely an element in the case for the consideration of the jury, and does not, in point of law, render the payment voluntary.

The Court then called on

Hannen to support the rule.—The direction of the learned Judge, which proceeded on the authority of *Brown v. Kempton* (a), was incorrect; because in this case the debt was not due at the time the bankrupt gave the bill to the defendant. There is no case which decides that a simple request to pay a debt not then due will prevent the payment from being voluntary. It is not denied that there may be a pressure which would justify the payment, although the debt was not due; but a simple request is insufficient. The mode in which the question was left to the jury was calculated to lead them to a wrong conclusion as to the principle on which their verdict ought to be found, and therefore the plaintiffs are entitled to a new trial: *Van Casteel v. Booker* (b). [*Alderson*, B.—The circumstance of the debt not being due affords an argument for the jury that it was not paid under pressure; but they have found that it was.] Where the payment of a debt which is due does not originate with the bankrupt, it is not voluntary, though made on a simple request, since it is a payment in the ordinary course of business; but where the debt is not due the payment is by way of favour and preference. [*Pollock*, C. B.—In the case of *Crosby v. Crouch* (c), the bankrupt, at the defendant's request, had delivered to him goods as a security for bills which he had discounted for the bankrupt, and which were payable at a future day. Lord *Ellenborough*, C. J., in delivering the judgment of the Court, says, "The circumstance of the debt secured not being de-

(a) 19 L. J., C. P., 169. (b) 2 Exch. 691. (c) 11 East, 256.

mandable and capable of being enforced at the time, makes no difference, as was held in the case of *Thompson v. Freeman* (a), and *Hartshorn v. Slodden* (b), decided as to that point on the authority of *Thompson v. Freeman*."] In that case Lord *Ellenborough*, C. J., observes, that the giving the security was "not referable to any supposition of favour and preference exercised on the part of the bankrupt, but to urgency and importunity applied on the part of the person obtaining the deposit." [*Alderson*, B.—In delivering judgment in the case of *Cook v. Rogers* (c), I said, "that in cases where the payment has been made before the debt was due, that circumstance has sometimes been relied on as an indication that the payment is voluntary, and at other times has been said to be immaterial; but neither in the one case nor in the other do these facts of themselves furnish any criteria; they are only ingredients in the whole question upon which the jury are to come to a determination."] There is no case in which the payment of a debt before it was due has been held valid, unless the payment has been obtained by pressure and importunity.

POLLOCK, C. B.—The rule must be discharged. The learned Judge directed the jury according to the law as laid down by the Court of Exchequer Chamber in the case of *Brown v. Kempton* (d), and they found a verdict for the defendant. It is said, however, that the learned Judge misdirected the jury, because he did not tell them, that, this being a case where the debt was not due, there ought to be something more than a simple demand to render the payment not voluntary. I am clearly of opinion that the circumstance of the debt not being due makes no difference in point of law, though it may be an ingredient from which the jury might conclude that the payment was voluntary. I observe that my Brother *Alderson*, in the case

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(a) 1 T. R. 155.

(b) 2 Bos. & P. 584.

(c) 7 Bing. 438.

(d) 19 L. J., C. P., 169.

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of *Cook v. Rogers* (a), says, "It seems to me, therefore, that the motives and intentions of the bankrupt may be material or immaterial, or, to speak accurately, may be more or less material, according to his situation, to the nature of the threat, and the degree and period of urgency by the creditor." No doubt that is so: for instance, if the holder of a bill falling due on a Monday came to the bankrupt on the previous Saturday night, and said he wanted the money, and the bankrupt thereupon gave it him, it ought to be left to the jury to say whether the bankrupt intended to favour the creditor, or whether he paid him *bonâ fide*, and in consequence of the application. Therefore, it is impossible to lay down as a rule of law that the Judge is to state the degree of urgency which is required in any particular case; but the question is one of fact, which must be left to the jury. Here the question was left to them in conformity with the law as laid down by the Exchequer Chamber.

ALDERSON, B.—I am also of opinion that the rule ought to be discharged. The question is, what is the meaning of a voluntary payment? I apprehend that a voluntary payment is a payment simply by the act and will of the party making it; and that, if there is anything to interfere with or control this will, then it is not a voluntary payment. It is said that a payment is voluntary when made as a matter of favour, but it may, nevertheless, not be a voluntary payment. Suppose a person, who has done another many favours, comes to him and asks, in return, a favour for a third party, and the person asked says, "It is against my will, yet, as you request the favour, I will grant it:" would that be a voluntary act? It would in one sense, because he has the power to refuse it; but still there is an influence, for he grants the favour upon the solicitation of a person who has a right to ask it. So here, if the creditor had not asked

(a) 7 Bing. 438.

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for payment the bankrupt would not have given him the bill. If the bankrupt had said to the creditor, "Come and ask me for payment, I cannot make it safely unless you ask," and the creditor had done so, that would have been a voluntary payment, because the application for it emanated from the bankrupt himself. But where the application is bonâ fide on the part of the creditor, he is not bound to threaten legal proceedings, or to use any urgency of a disagreeable nature. It was left to the jury whether the payment was made under pressure, and they found that it was.

PLATT, B.—I am of the same opinion. It has been argued, that, because the credit had not expired, the payment was voluntary. But the law is, that a demand alone, if made bonâ fide, justifies the payment. The circumstance of the debt not being due was a matter for the consideration of the jury, and they have found that it was paid in consequence of pressure.

MARTIN, B.—I am also of opinion that the rule ought to be discharged. There was evidence of a pressure upon the bankrupt; for the defendant told him that his demands for cash were urgent, and he pressed the bankrupt to give him something negotiable for cash. Therefore, upon the evidence, the jury were justified in finding that the payment was not voluntary. The question of fraudulent preference is one which ought to be clearly understood. By the general law, the act of bankruptcy is the dividing point: up to that time the bankrupt is the owner of his property, and has the dominion over it. In Lord *Mansfield's* time it was decided, that, as the bankrupt law contemplated an equal distribution of the bankrupt's effects amongst all his creditors (a), if a preference took place anterior to the act of bankruptcy, notwithstanding the bankrupt was then the owner of the property, the transaction was void as against

(a) *Worsley v. Demattos*, 1 Burr. 477.

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creditors, since it had a tendency to defeat the legal distribution of the bankrupt's estate; and the assignees might recover back the property so given in preference. That continued to be and is the law; but at one time, through a misapplication of it, things came to such a pass that there was scarcely a transaction with a trader which was not liable to be set aside. The first step taken to restore the law to its right footing was in the case of *Morgan v. Brundrett* (a), where *Littledale, J.*, laid down that, to make a payment to a creditor a fraudulent preference, and void, "two things must concur: it must have been made by the bankrupt voluntarily, and also in contemplation of bankruptcy. The same law was laid down by *Parke, J.*, and also by *Patteson, J.*, who there says, "Upon the question of pressure, in order to shew that the deposit was made voluntarily, I think it ought to have appeared clearly that the bankrupt took the first step towards making the deposit." A case of *Fidgeon v. Sharpe* (b) is there referred to, in which *Gibbs, C. J.*, also expressed an opinion that the act must be done with intent to contravene the bankrupt law, and in contemplation of bankruptcy. Then, applying the law as it now stands to the facts of this case, the verdict is perfectly correct; for every creditor has a right to get payment of his debt, and though it be not payable, yet if the debtor owes the money, and chooses to pay it, what is there to prevent the creditor from receiving it? It is argued that there ought to be importunity and pressure on the part of the creditor; but that point was considered in the case of *Mogg v. Baker* (c), where a trader in insolvent circumstances assigned his goods to a creditor in consequence of a bonâ fide demand. There *Parke, B.*, told the jury that *pressure* of the creditor was not necessary; but that, if the assignment originated with the insolvent, it would then be a fraudulent preference." The jury having found a verdict for the defendant, *Mr. Crowder* moved for

(a) 5 B. & Ad. 289. (b) 5 Taunt. 545. (c) 4 M. & W. 348.

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a new trial, on the ground of misdirection; but Lord Abinger, C. B. (than whom no one was more conversant with this branch of the law), said, "I am of opinion that the verdict was right, and the direction right. There is a fact in the case which seems to have escaped Mr. Crowder's attention, which is, that the insolvent said he executed the bill of sale because he apprehended, if he did not, the creditor would put in a distress. I do not, however, think this was necessary; and I should be sorry to have it understood that I thought it essential. I think, if a demand is made by a creditor *bonâ fide*, and a transfer takes place in pursuance of that demand, that takes it out of the case of voluntary transfer contemplated by the Insolvent Act." I entirely concur with this, and I should be sorry to be a party to any decision which had a tendency to bring back that state of things which formerly caused so much injustice. The circumstance that the debt is not due is one for the consideration of the jury; but in point of law it makes no difference, for a creditor has a right to ask for security for his debt; and if in consequence of his request property is transferred to him, the transfer is upon a good and valuable consideration. For these reasons, I think that the rule ought to be discharged.

Rule discharged.

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THE EARL OF LONSDALE v. RIGG.

THIS was a special case, stated to decide the right of pursuing and killing grouse and other game over the land called Bretherdale Bank, in the parish of Orton, in the county of Westmoreland. The first count was in trespass for breaking and entering the land of the plaintiff called Bretherdale Bank, and for pursuing, killing, and taking away grouse and other game there. The second count was in trover, for dead grouse of the plaintiff. The third count was in case, for the disturbance of the plaintiff's exclusive right of shooting and killing grouse on Bretherdale Bank.

Bretherdale Bank is a tract of inclosed pasture land within the manor of Bretherdale, in the county of Westmoreland. Bretherdale Bank had been from time immemorial subject to eighty customary rights called cattlegates. The plaintiff was lord of the manor of Bretherdale. The defendant was seized of certain cattlegates as a customary estate of inheritance. The plaintiff was also the owner of a cattlegate which came to his predecessor as lord of the manor by seizure quousque for nonpayment of a fine. Bretherdale Bank is separated from Bretherdale Waste by a fence which the cattlegate owners kept in repair with stones got from Bretherdale Bank and from the adjoining waste. Each cattlegate gave the owner thereof a right of depasturing on Bretherdale Bank a certain number of cattle and sheep from the 26th of May to the 24th of April, but neither cattle nor sheep were allowed to pasture there between the 24th of April and the 26th of May. An alteration had been made in the time of stinting by substituting the 26th of May for the 1st of June; but it did not appear that the lord of the manor had any notice of the alteration, and the court rolls did not contain any mention of stinting. The whole of the cattle and sheep depastured Bretherdale Bank in common. A frithman was appointed by the cattlegate owners, whose duty it was to take care that Bretherdale Bank was properly stinted, and he was remunerated for his trouble by the cattlegate owners. A cattlegate owner having a house within the manor had also a right to cut peat for consumption in his house. By 46 Geo. 3, c. lxiv., authority was given to the lord of the manor to enfranchise any copyhold or customary messuages, cottages, lands, tenements, or hereditaments, parcel of the manor; and several cattlegates were enfranchised under this Act: but there was no distinction in point of enjoyment between the enfranchised and the customary cattlegates. From time immemorial the cattlegates had been held of the lord of the manor as customary estates of inheritance by payment of fine certain, rents of small amount being payable annually for each cattlegate, and under dues, duties, suits, and services of right accustomed. On the death of a cattlegate owner, the cattlegate descended by custom to the heir at law, who was admitted at the lord's court, when he paid a fine. The cattlegates also passed by customary deed, followed by admittance at the next lord's court, or out of court by the steward of the manor. The deed was brought into court by the alienee, and was presented by the jury or homage. A fine was payable on the admittance, but there was no heriot due on the death of the lord of the manor; the owners of cattlegates might by the custom enforce their admittance by the new lord, on payment of a fine. The lord was entitled to seize quousque for nonpayment of fines. On alienation by a feme covert, the woman was examined apart from her husband. The lords of the manor had always searched for, pursued, and killed grouse and other game on Bretherdale Bank, no other person having claimed to do so, or ever having done so except by their license. Since 1819, the lords of the manor had preserved the game.

In an action of trespass and trover for shooting grouse on Bretherdale Bank without the plaintiff's permission,—*Held*, per *Platt*, B., and *Martin*, B., that, under the preceding facts, the action was maintainable; per *Pollock*, C. B., and *Alderson*, B., that it was not.

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The defendant pleaded, first, to the whole declaration, not guilty. Secondly, to the first count, that the land was not the land of the plaintiff. Thirdly, to the first count, that the land was the close, soil, and freehold of the defendant. Fourthly, to the third count, a traverse of the plaintiff's exclusive right of shooting and killing grouse on Bretherdale Bank.—Issues thereon.

The cause came on for trial at the Summer Assizes for Westmoreland, 1854, when an order of *Nisi Prius* was made, under which the following case was stated for the opinion of this Court:—

Bretherdale is a manor in the county of Westmoreland, and has been so from time immemorial. Bretherdale Bank is a tract of inclosed pasture land, containing about 508 acres, and is, and from time immemorial has been, within the said manor. Within the manor, and in the neighbourhood, it is usually called stinted pasture, and sometimes common pasture. It adjoins Bretherdale Waste or Common, from which it is divided by a fence. This fence the cattlegate owners maintain among themselves, each owner maintaining and keeping in repair a certain part of the fence in proportion to the number of cattlegates he owns. The fence is never taken down. It is repaired with stones got by the cattlegate owners from the Bretherdale Bank, or the Bretherdale Waste or Common, or wherever they can find them. Every owner of lands within the manor is entitled to common of pasture within Bretherdale Waste or Common. The Earl of Lonsdale is, and for several years has been, lord of the said manor, being seised of the said manor, with its rights and appurtenances, for the term of his life. The late Earl of Lonsdale, the plaintiff's father, was also lord, and seised for life of the manor. They derived the estate under the will of James, Earl of Lonsdale, who was seised of the said manor in fee. From time immemorial the said land, called Bretherdale Bank, has been and is subject to eighty customary rights, called cattlegates; of four of which cattlegates the defendant Jonathan Rigg is

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seised as a customary estate of inheritance, the other cattlegates being vested in about eighteen other persons as customary estates of inheritance.

The plaintiff is, and for many years has been, the owner of a cattlegate, which came to his predecessor, as lord of the said manor, by seizure quousque for non-payment of a fine. Of late years he purchased some other cattlegates in addition. A witness, who had been a game watcher for the plaintiff for fourteen years, stated that in his time he had never known the plaintiff interfere with Bretherdale Bank, except as to shooting over it. The plaintiff lives at a distance. Each cattlegate confers on the owner thereof the right of depasturing on Bretherdale Bank one head of cattle, that is to say, one cow, one heifer, or one yearling foal, from the 26th of May to the 24th of April in every year, and, in addition, of depasturing from the 10th day of October until the 24th day of April, both inclusive, as many sheep as the cattlegate owner has. A person having a right of common on Bretherdale Waste or Common has not, as such, any right to turn cattle on Bretherdale Bank. From the 24th of April to the 26th of May, neither cattle nor sheep are allowed to pasture on Bretherdale Bank. It was proved by an old witness, that in his recollection an alteration in the time of stinting had been made at a meeting of the owners of cattlegates, by substituting the 26th of May for the 1st of June. There was no evidence that the lord of the manor had notice of any change in the time for stinting. There is nothing about stinting in the court rolls. The cattle and sheep turned on by the several owners of the said cattlegates depasture the whole of Bretherdale Bank in common. A person, called the frithman, is from time to time elected by the owners of the cattlegates. His duty is to take care that Bretherdale Bank is properly stinted and not overstocked; he has for his trouble the right of depasturing cattle and sheep, as if he was the owner of two cattlegates. For four or five years past a herd in addition

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has been appointed by certain of the cattlegate owners by written agreement among themselves, who has been paid by such owners 1s. per annum for each cattlegate of which they are owners. The owner of a cattlegate, being also owner of a house within the manor, is also entitled to cut peat on Bretherdale Bank, to be consumed in his house within the manor, but not out of the manor.

By an Act of Parliament (46 Geo. 3, c. lxiv.) authority was given to William Viscount Lowther, during his life, and after his decease to the person for the time being seised or entitled to the freehold of certain manors, and amongst others of the manor of Bretherdale, to enfranchise any copyhold or customary messuages, cottages, lands, tenements, or hereditaments, parcel or reputed parcel of the said manors. William Viscount Lowther, mentioned in that Act, was afterwards created Earl of Lonsdale, and died in 1844; he was the father of the plaintiff, the present Earl. Under the provisions of the said Act several cattlegates have been enfranchised by the said William Viscount Lowther and by the present plaintiff. There was no evidence of any distinction in point of enjoyment between the enfranchised and the customary cattlegates. (A copy of the Act and of one of the deeds of enfranchisement accompanied the case, and were to be referred to as part thereof (a)). The cattle-

(a) The admittance was as follows:—

“Manor of Bretherdale, in the county of Westmoreland. } Be it remembered this 14th day of July, 1852.

Before L. H., of Penrith, gentleman, steward of the said manor, out of court came J. Rigg, of &c., and prayed to take of the Right Honourable William Earl of Lonsdale, lord of the said manor, all those four cattlegates or beast grasses in a stinted pas-

ture, called Bretherdale Bank, within the said manor, of the yearly customary rent of 1s. 4d., upon the surrender of Thomas Webster, of &c., as appears by deed, bearing date the 31st of January, 1852, consideration 40l.; whereupon the said lord, by his said steward, doth hereby admit the said J. Rigg tenant of the said premises, on payment of 10s. and 1s. 6d. for a fine, to have and to hold the said premises, with the appurtenances,

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gates from time immemorial have, by the respective owners thereof for the time being, been holden of the lord of the manor for the time being, according to the custom of the said manor, as a customary estate of inheritance, by payment of fine, certain rents of small amounts payable annually for each cattlegate, and by and under dues, duties, suits, and services of right accustomed. On the death of the owner of a cattlegate, it descends by the custom to the

unto the said J. Rigg, according to the custom of the said manor, he yielding and paying and performing for the same unto the said lord the said yearly rent at the days and times accustomed, and all other dues, duties, suits, boons, and services as are therefore due and of right accustomed.' L. H. (Steward).

By the deed of conveyance it was witnessed, that, in consideration of 40*l.*, "he the said T. Webster hath granted, bargained, sold, aliened, released, surrendered, and conveyed, and by these presents doth grant, bargain, sell, alien, release, surrender, convey, and confirm unto the said J. Rigg, his heirs and assigns, all those four cattlegates or beast grasses in, upon, and over the close of pasture ground called Bretherdale Bank, within the manor of Bretherdale, in the parish of Orton, in the county of Westmoreland, holden of the Right Honourable William Earl of Lonsdale, by payment of the yearly fine - certain, rent of 1*s.* 4*d.*, together with all and singular lands, grounds, meadows, feedings, pastures, commons, common right, common of pasture and turbary, hedges,

walls, fences, ditches, ways, paths, passages, waters, watercourses, easements, rights, liberties, privileges, profits, commodities, advantages, hereditaments, and appurtenances whatsoever to the same belonging or of right appertaining or accepted, reputed, taken, and known, as part, parcel, or member thereof; and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, interest, right, title, possession, customary or tenant right, inheritance, benefit of admittance, property, claim, and demand whatsoever, both in law and equity, of him the said T. Webster in, to, or out of the same premises or any part thereof: To have and to hold the said cattlegates, hereditaments, and premises hereinbefore mentioned, and hereby surrendered and conveyed or otherwise assured, or intended so to be, with their appurtenances, unto the said J. Rigg, his heirs and assigns, to the only proper use and behoof of the said J. Rigg, his heirs and assigns, for ever, according to the custom of the manor of Bretherdale aforesaid," paying 1*s.* 4*d.* customary rent, &c.

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heir at law, and the heir is at the lord's court admitted tenant, and pays a fine. The cattlegates also pass by customary deed, followed by admittance at the next lord's court, or out of court by the steward of the manor. The deed is brought into court by the alienee, and it is presented by the jury or homage. A fine on the admittance is payable, but there is no heriot due. (Copies of the defendant's purchase deed and of his admittance thereon accompanied the case, and might be referred to as shewing the customary form of the conveyance and admittance). On the death of the lord of the manor, the owners of cattlegates can be compelled by the custom to be admitted by the new lord, and to pay a fine. A court, called the court baron and customary court of dimission of the lord of the manor, is held from time to time before tenants of the manor, who form the jurors or homage. Owners of cattlegates serve on this jury or homage. The lord is entitled to seize quousque for non-payment of fines. On alienation by a feme covert, the woman is examined by the steward separate and apart from her husband.

The plaintiff and his father, the said William Viscount Lowther, afterwards Earl of Lonsdale, and their predecessors, lords of the said manor, have always by themselves and by their gamekeepers, and other persons authorised by them, searched for, pursued, and killed grouse and other game on and over Bretherdale Bank without obstruction from the said cattlegate owners or any of them, until the defendant shot grouse as hereinafter mentioned. No other persons claimed to be entitled to search for, pursue, or kill grouse or game on or over the said Bretherdale Bank, and no person searched for or pursued or killed grouse or other game on or over the said Bretherdale Bank, except by stealth, or by the leave of the lord of the said manor for the time being. A cattlegate owner appeared in the evidence to have searched for, pursued, and killed grouse on and over Bretherdale Bank, he having previously asked for and obtained the leave of the

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Earl of Lonsdale, then lord of the said manor, so to do. It was proved that, since 1819, the Earls of Lonsdale, lords of the said manor, have always preserved the game on the said Bretherdale Bank, and prevented persons unauthorised by them from searching for, pursuing, or killing grouse or game there.

On the 12th of August, 1852, the defendant, having become owner of four cattlegates as hereinbefore mentioned, claimed a right to pursue and kill grouse on and over Bretherdale Bank, and entered into and upon Bretherdale Bank for the purpose of searching for, pursuing, and killing grouse there; and the defendant on that day found two brace of grouse on the said Bretherdale Bank, which he shot at and killed there, and afterwards carried away and converted to his own use.

The Court were to draw any inferences or conclusions which a jury ought, in their opinion, reasonably to draw from the facts stated.

The questions for the opinion of the Court were—

First: Whether the plaintiff can maintain the present action against the defendant for shooting at, killing, or carrying away the said grouse.

Secondly: In what manner the verdict ought to be entered.

The case was argued in last Easter Term (April 23) by

Hugh Hill (*Knowles* and *Unthank* with him) for the plaintiff—The plaintiff rests his case upon the two following propositions:—first, he contends that the soil of the place in question is in him, such right being subject to certain qualified rights of the defendant, and that such title carries with it the absolute right of pursuing and killing game on the land; and secondly, that if the plaintiff is not entitled to such an absolute right in the soil, still that the facts shew an exclusive right in the plaintiff to pursue and

kill game there, so as to entitle him to maintain this action for the infringement of his right.

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First.—The plaintiff is lord of the manor and owner of the soil, such right being merely subject to that of pasturage by the cattlegate owners. They hold as customary tenants of inheritance, and are entitled to several pasturage, but not to a general right of common. They also have a limited right of turbary. These rights are held of the lord of the manor, and upon the death of any of the cattlegate owners, the estate of the deceased descends to the heir, who is admitted on payment of a fine. Certain small annual rents are also payable to the lord of the manor, and he is entitled to seize quousque for non-payment of fines. The title of the tenant of such an estate as the defendant's was discussed in *Doe d. Reay v. Huntington* (a), where it was held that it was not freehold. Lord *Ellenborough*, C. J., in delivering the judgment of the Court, said: "These customary estates, known by the denomination of *tenant right*, are peculiar to the northern parts of England, in which border services against Scotland were anciently performed, before the union of England and Scotland under the same sovereign. And although these appear to have many qualities and incidents which do not properly and ordinarily belong to villenage tenure, either pure or privileged (and out of one or other of these species of villenage all copyhold is derived), and also have some which savour more of military tenure by *escuage uncertain*, which, according to Littleton, sect. 99, is *Knight's service*; and although they seem to want some of the characteristic qualities and circumstances which are considered as distinguishing this species of tenure, viz. the being holden at the will of the lord, and also the usual evidence of title by copy of court-roll, and are alienable also contrary to the usual mode by which copyholds are aliened, viz. by deed

(a) 4 East, 271.

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and admittance thereon (if indeed they could be immemorially aliened at all by the particular species of deed stated in the case, viz. a bargain and sale, which at common law could only have transferred the use); I say, notwithstanding all these anomalous circumstances, it seems to be now so far settled in Courts of law, that these customary tenant-right estates are not freehold, but that they, in effect, fall within the same consideration as copyholds, that the quality of their tenure in this respect cannot properly any longer be drawn into question." In the case of *Stephenson v. Hall* (a), Lord Mansfield and Denison, J., considered it to be a settled point, that, in the case of customary estates, 'the freehold was in the lord.' And in the case of *Burrell v. Dodd* (b), the Court of Common Pleas expressly held that these customary tenant-right estates were not freeholds." These authorities were considered and recognised in the recent case of *Thompson v. Harding* (c). Now, an interest in a several pasture may be the subject of tenure. In 1 Wms. Saund. 352 n, it is laid down, that "it has long been settled that a man may prescribe to have the sole and several pasture, vesture, or herbage for a limited time in every year, in exclusion of the owner of the soil: Fitz. Prescription, 51; Co. Litt. 122. a., 2 Roll. Abr. 267 (L), pl. 6; *Sir George Sparke's case* (d), *Pitt v. Chick* (e). But it was for some time a question whether a prescription for a sole and several pasture, &c. in exclusion of the owner of the soil for the whole year, was good. In *North v. Coe* (f), the Court of Common Pleas was equally divided upon it; but in the principal case, the Court of King's Bench inclined to think the prescription might be supported; and in *Hoskins v. Robins* (g), it was adjudged, that the

(a) 3 Burr. 1278.

(b) 3 Bos. & P. 378.

(c) 1 C. B. 940.

(d) Winch's Rep. 6.

(e) Hutt. 45.

(f) Vaugh. 251; 5 C., 1 Lev. 253.

(g) 2 Saund. 324; 5 C., 2 Lev. 2; Pollexf. 13; 1 Mod. 74.

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prescription was good, for it does not exclude the lord from all the profits of the land, as he is entitled to the mines, trees, and quarries; and the law has been so considered ever since." In *Welcome v. Upton (a)* it was held, that such a right is capable of being granted away, and does not necessarily go to the heirs of him who has it. The payment of rent also shews that the tenant's estate is less than one of freehold. The lord of the manor might distrain for it: Co. Litt. 142. a. Now, a grant of herbage does not pass the freehold. In Co. Litt. 46, it is said, that "If a man hath twenty acres of land and by deed granteth to another and his heirs vesturam terræ, and maketh livery of seisin secundum formam chartæ, the land itself shall not pass, because he hath a particular right in the land, for thereby he shall not have the houses, timber-trees, mines, and other real things parcel of the inheritance, but he shall have the vesture of the land, that is, the corn, grass, underwood, sweepage, and the like, and he shall have an action of trespass quare clausum fregit; but, by grant thereof and livery made, the soil shall not pass, as is aforesaid." These authorities support the plaintiff's position, that the defendant has no such interest in the soil as owner as entitles him to kill grouse, but that the lord of the manor has the exclusive right, and that he is entitled to maintain an action against a tenant for infringing such right.

Secondly, independently of the preceding question, there is evidence of the plaintiff's exclusive right to kill grouse upon the land; for no one but the lord of the manor, except by his permission, has ever enjoyed that privilege.

Grant (Watson with him) contra.—First, the defendant has the freehold in the soil, for a cattlegate is not a mere right of common, but gives such an interest in the land as is sufficient to pass the whole soil. The following decisions

(a) 6 M. & W. 536.

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are authorities that cattlegates on stinted pastures pass the freehold : *Mellington v. Goodtitle* (a), *Metcalf v. Roe* (b), *Rex v. Whitley* (c). Now, although these cattlegates are held of the lord by certain services, still that fact does not affect the defendant's position, for distress was always inseparable from service : Co. Litt. 151. a ; 1 Hen. 4, fol. 1, pl. 3. And these services shew an interest in the soil, for the right of distress does not exist in the case of a right of common, as there cannot be an entry upon an incorporeal hereditament. And debt does not lie for services annual, including rents : Coke Copyholder, s. 30. There would be no mode of enforcing or realising the services by which these cattlegates are held, if they were mere rights of common, that is to say, incorporeal hereditaments. The following are acts of ownership on the part of the cattlegate owners :—They fence the land ; and the repair of fences has been expressly held to be an act of ownership : *Jones v. Williams* (d). They appoint a frithman, whose duty it is to look after the management and enjoyment of the pasture ; and they change the times and management of the stint at their pleasure. They also have the exclusive use of the land, for it is found as a fact that the plaintiff never interferes with the management of it. This implies a right to the soil : *Busjard v. Capel* (e). The same right is implied from the exclusive right of pasturage : Cro. Eliz. 421 ; Co. Litt. 4. a ; Com. Dig. Grant, E. 5. In *Cox v. Mousley* (f) it appeared that certain persons who had the forecrop each year in a piece of inclosed land, put on their own gates and kept them locked from February to July in each year, (when they took them off, and the burgesses of D. came into possession until February in the year following), and it was held that on these facts the parties in question had the right

(a) Andr. 106 ; in Error, 2 Str.

1084.

(b) Cited in Andr. 107.

(c) 1 T. R. 137.

(d) 2 M. & W. 330.

(e) 8 B. & C. 141 ; in Error, 6 Bing. 150.

(f) 5 B. & C. 540.

to the freehold. "The general rule is, that he who has the surface has the subsoil:" *Lewis v. Branthwaite* (a). In *Doe v. Bevis* (b) it was held that *pastura bosci* might carry the land; and in *Ward v. Petifer* (c) *prima tonsura* was held to pass the land; for *prima facie* the owner of the surface is presumed to be the owner of all that lies below it: *Keyse v. Powell* (d), *Smith v. Lloyd* (e). And moreover there is no evidence of any acts of ownership on the part of the plaintiff. He has not opened mines or got stone or gravel, or cut turf, or done any such act of ownership. And the cattlegate owners being in exclusive possession of the land, "the presumption of law is that the freehold is in the party who is in the possession of the land till the contrary be shewn:" per *Wilde, C. J.*, in *Busher v. Thompson* (f). The cattlegates pass, on the death of a tenant, to his heir at law, and therefore the freehold and the inheritance meet, and these together constitute the whole interest in the soil. Now there is nothing to shew that the tenure is base or less than freehold. The payment of rent, which is one of the services on which the cattlegates are held, does not shew the tenure to be base: per *Maule, J.*, in *Busher v. Thompson*. Rent certain may be due in knight service tenure. When the 12 Car. 2, c. 24, reduced knight service to socage tenure, rents certain were expressly reserved by the 5th section of that statute. Rent may be payable in respect of an enfranchised tenement: *Roe v. Ireland* (g); and rent might always have been due for land held in socage tenure: 2 Blac. Comm. 86. The other services found to be in existence do not reduce these holdings below freehold tenure; but the presumption is to the contrary, for it appears that they are held by suit at the court baron, and this could be performed by freeholders only. And although they are compelled to be admitted, still this is the case with

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(a) 2 B. & Ad. 437.

(b) 7 C. B. 456.

(c) Cro. Car. 362.

(d) 2 E. & B. 132.

(e) 9 Exch. 574.

(f) 4 C. B. 58.

(g) 11 East, 280.

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all freeholders. It has always been considered essential to the existence of a manor that there should be at least two freeholders in it. The lord is entitled to know who his tenants are: *Doe v. Hellier* (a). In *Doe d. Bover v. Trueman* (b) the Court said, "It is of importance to the lord that all his tenants should attend his courts, and this seizure quousque is the only proceeding that the law knows for compelling the attendance of the heir." The admittance here is not in the form of a copyhold admittance. It wants the operative words of such admittances: Co. Litt. s. 74. As many as thirty-four different forms of admittance are to be found in Scriven on Copyholds, pp. 756—799; but each of these states that the tenant holds by copy of court roll. This admittance, however, contains no such statement. It does not purport to grant the estate, and the reason is, that, as there is no surrender, it is never in the lord, and therefore he could not grant it. The estate of the tenant passes by deed inter vivos, and to the heir at law on the death of the tenant. But a copyhold interest can only be transferred by copy of court roll: Coke's Copyholder, s. 36. A copyholder cannot alien by deed, for by so doing a forfeiture is created: Litt. s. 74; Com. Dig. Copyh. M. 2; per *Manwood*, C. B., in *Heydon's case*, 3 Rep. 9. As these estates pass by bargain and sale, they must be of freehold: *Bingham v. Woodgate* (c), *Reg. v. Ingleton* (d). The fact of these cattlegates being sometimes called cowgrasses does not affect the question: cowgrass is merely a provincial term used in the county of Westmoreland: *Doe d. Hamilton v. Clift* (e); so beastgate is sometimes used in the same sense: *Mellington v. Goodright* (f); or pasturegate: *Reg. v. Preston* (g). These cattlegates are held by freehold tenure—the holders have a freehold interest, the inheritance concurs, and consequently the holders have the entire right to the soil.

(a) 3 T. R. 169.

(b) 1 B. & Ad. 746.

(c) Toml. Chanc. Rep. 198.

(d) 8 Dowl. P. C. 695.

(e) 12 A. & E. 566.

(f) Andr. 106.

(g) 5 D. & L. 7.

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Secondly, the holders of this interest are by virtue of such right entitled to shoot the grouse on the land. Every owner of the soil has at law the right to the game upon it *ratione soli*: 2 Blac. Comm. 394 Id. 415; unless the right be overridden by the franchise of freewarren vested in a third party. Freewarren, however, does not include grouse: *Duke of Devonshire v. Lodge* (a). Until the passing of the statute 1 Jac. 1, c. 27, by which grouse were first protected, they were on the same footing as sparrows, larks, crows, and birds of that description now are. But the owners of the soil have not lost their common law right in this respect. The statute law has not deprived them of it, for the game laws merely impose certain restrictions on the common law right, by requiring a certain qualification and a license to shoot game. Neither have they lost their right by prescription, so as to give to the lord of the manor the exclusive right of shooting grouse: for such prescription could not have a legal origin, as the Crown never possessed the prerogative of granting to the subject anything more than the acknowledged prerogative of the exclusive right to the *game*, as understood by that term before the time of legal memory. The only birds of warren are pheasants and partridges, and the sovereign never had the prerogative of granting to one subject the right to kill, on the land of another, any but birds of warren. Every prescription must have its origin either in grant, or be such that the Court can see that it might have had a legal inception in that way: *Mayor of Lyme v. Henley* (b). This right could not originate by prescription. Even if it could have done so, the user has not been, and cannot have been, continuous, (which is an essential element in a good prescription); for the 25th Hen. 8, c. 17, s. 19, as given by the Record Commissioners, enacts that "It shall be lawful for the inhabitants of the country of Westmoreland, Northumberland, Durisme,

(a) 7 B. & C. 36.

(b) 2 Cl. & F. 354-5.

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and Cumberland, to keep in their houses cross-bows and hand-guns, and shoot in the same for defence of their persons, goods, and houses against thieves, Scottes, and other the king's enemies, and for cleansing and scouring the same only, and for none other purpose, this Act or anything comprised within the same notwithstanding." This statute was in force for several years, till it was repealed by the 33 Hen. 8, c. 6, s. 9. Here then was a rightful interruption of the prescription, if it ever existed; and a rightful interruption of the user invalidates and destroys a prescriptive claim: Co. Litt. 113. b., 114. b. The plaintiff does not rely on any grant as conveying to him the right, but only by user. But a claim by *user* cannot be established, for no one can justify by custom or prescription, which destroys or prejudices the inheritance of another, unless it be for the common weal: 13 Hen. 8, fol. 16. No one can claim a rent, common, or other profit of inheritance, by usage: *Finch's case* (a), *Gatewood's case* (b). Moreover, this claim is of an exclusive right, and, as the Court said in *Clayton v. Corby* (c), "It is observable that in all cases of a claim of right in alieno solo, such claim, in order to be valid, must be made with some limitation or restriction." And a custom which alleges a right arbitrary in the lord to burden the land of another without compensation is bad: *Willes v. Broadbent* (d).

Hill replied.

Cur. adv. vult.

The learned Judges, having differed in opinion, now delivered their judgments seriatim.

MARTIN, B.—This is a special case for the judgment of the Court. The questions at the end of the case are two—First, whether the plaintiff can maintain the present action

(a) 6 Rep. 64 a., 67 a.
 (b) 6 Rep. 59 b.

(c) 5 Q. B. 419.
 (d) 2 Str. 1225.

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against the defendant for shooting at, killing, or carrying away grouse from certain land called Bretherdale Bank, in the county of Westmoreland; and secondly, in what manner the verdict ought to be entered. The second question, therefore, involves the determination of how the issues ought to be found. The first count is trespass to land of the plaintiff called Bretherdale Bank, and for pursuing, killing, and taking away grouse and other game there. The second is trover for dead grouse of the plaintiff's. The third is for disturbance of the plaintiff's exclusive right of shooting and killing grouse on Bretherdale Bank. The pleas are, first, not guilty to the whole declaration; secondly, to the first count, land not the plaintiff's; thirdly, to same, liberum tenementum in defendant; fourthly, to the third count, traverse of plaintiff's exclusive right. It was observed in the argument, that there was no plea denying the plaintiff's property in the grouse mentioned in the second count. This was clearly an oversight in the defendant's pleader; and it was stated by the learned counsel for the plaintiff, that it was his object to obtain a judgment upon the right, and that the property in the dead grouse might be considered as traversed by the plea of not guilty.

I have carefully read the special case, and find that in reality it involves no question of law as to which there was any difference at the bar. The plaintiff has no right of freewarren, and, if he had, grouse are not birds of warren: *Duke of Devonshire v. Lodge (a)*. He therefore must establish his right to the grouse, either as owner and possessor of the land on which the grouse were killed, or as having such an exclusive right as alleged in the third count. If the judgment depended upon whether he has such an exclusive right, I think we are not in a condition to decide it. It is entirely a question of fact, and the circumstances stated in

(a) 7 B. & C. 36.

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the case are quite insufficient to enable a judgment to be formed upon it. It is probable that such an exclusive right may by law exist and be established by exclusive user. From the case of *Wickham v. Hawker* (a), it appears that a clause in a conveyance "excepting and reserving to the grantors and another person, their heirs and assigns, liberty to come into and upon the lands conveyed, and there to hunt, hawk, and fowl," operated as a grant to them of a license of profit, and is in its nature "a profit a prendre" within the Prescription Act, 2 & 3 Will. 4, c. 71, s. 2. If, therefore, it is competent for the owner of land to grant such a right, not exclusive, but concurrent with his own as owner, to kill game, no reason seems to exist why he may not grant an exclusive right; and if such right may be established by grant, it may also be established by immemorial user, or by evidence to satisfy the Prescription Act, which presupposes a grant before the time of legal memory. But the evidence in the present case is quite insufficient to enable us to decide whether such an exclusive right exists in the plaintiff or not. It is a right which ought to be strictly and clearly proved; all that is stated in the case is that the plaintiff and his father and their predecessors, as lords of the manor of Bretherdale, have always by themselves and their gamekeepers, and other persons authorised by them, searched for and killed grouse and game on Bretherdale Bank without obstruction from the cattlegate owners; and until the present defendant shot grouse, no one claimed to do so, or to search for and kill game thereon; and that no one did so, except by stealth or license of the lord of the manor; and that one cattlegate owner asked for and obtained leave of Lord Lonsdale to shoot grouse; and that, since 1819, Lord Lonsdale and his father preserved the game and prevented persons unauthorised (I should collect, persons other than cattlegate owners) from searching

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(a) 7 M. & W. 73.

for and killing game thereon. But there is nothing said whether all that was done by the lord of the manor was "of right;" and it may very well be, if the plaintiff's title rested solely upon the exclusive right alleged in the third count, that a jury might properly consider the facts stated to be accounted for by the position of the Earls of Lonsdale, and that the true explanation was, that the owners of the cat-tlegates were unwilling to interfere with their enjoyment of the authority to preserve and shoot the game—a matter probably of little importance to them, but to which persons in the position of the plaintiff attach considerable consequence; and indeed I think a claim to the exclusive right of the game upon another man's land is a claim which ought to be submitted to a jury to find their verdict upon, and not to a Court to infer from facts stated in a special case. It is a question entirely of fact, and one peculiarly fitted for a jury to decide.

But the question which the parties state in the first paragraph of the special case they desire to have a judgment upon, viz. the right of pursuing and killing game on Bretherdale Bank, arises upon the first and second counts, and it seems to me to resolve itself into this: whether the facts stated shew that the plaintiff is owner of and in possession of the land and soil of Bretherdale Bank; and that the interest of the defendant and the other cattle-gate owners is an incorporeal right or easement of several and exclusive pasture, that is, an exclusive right to consume the grass growing there by the mouths of their cattle. The property in wild grouse is not absolute in any one; it is a wild bird, *feræ naturæ*. So long as the grouse is upon a man's land he has a possessory property in it; but as soon as it flies or goes off his land his property is gone. Lord Holt thus expresses himself in *Sutton v. Moody* (a), "If a man keep conies in his close (as he may), he has a posses-

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(a) 1 Ld. Raym. 250.

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sory property in them so long as they abide there; but if they run into the land of his neighbour he may kill them, for then he has the possessory property." And his Lordship adds, "If A. start a hare on the ground of B., and hunt it and kill it there, the property continues all the while in B. But if A. start a hare on the ground of B. and hunt it into the ground of C. and there kill it, the property is in A. the hunter, although he is liable to actions of trespass to the lands both of B. and C.;" and this view of the law was adopted by the Court of King's Bench in *Churchward v. Studdy* (a). The right at common law, therefore, to such animals is very peculiar. So long as they remain upon a man's land they belong to him, but the moment they leave his land his property is gone; and this is so even if they be hunted out of his land by a trespasser, and although they be killed by the trespasser on another man's land,—the continued pursuit gives the property in the animals to the trespasser in exclusion of the person in whose land they are killed. If grouse, therefore, belongs to the person who is in possession of the land where they are, the real question in this present case is, who is in possession of the land and soil of Bretherdale Bank?

Now, on this subject the statement in the case is, that the plaintiff is lord of the manor of Bretherdale. That Bretherdale Bank is a tract of inclosed pasture land within the manor; and that the fences are repaired by the owners of the cattlegates by stones got on Bretherdale Bank, or on Bretherdale Waste or Common, or anywhere else. That from time immemorial Bretherdale Bank has been and is subject to eighty customary rights, called cattlegates. That each cattlegate gives the owner of it the right of depasturing a cow, a heifer, and a yearling foal, from the 26th of May to the 24th of April, and as many sheep as he has from the 10th of October until the 24th of April. That from

(a) 4 East, 249.

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the 24th of April to the 26th of May, no cattle of any kind are entitled to be on the bank. That the owners of the cattlegates exercised the rights of substituting the 26th of May for the 26th of June for the commencement of the pasturage, without consulting the lord; and that they appoint persons called the frithman and the herd, to attend to the land and the cattle. That the owner of a cattlegate having a house in the manor is entitled to cut peat on Bretherdale Bank, to be consumed in his house within the manor, but not elsewhere. That there was no instance of the plaintiff or of his predecessors interfering with Bretherdale Bank except by shooting over it. That the plaintiff is owner of several cattlegates, one of which came to him by forfeiture, and others being obtained by purchase. That the defendant is owner of four cattlegates. That the cattlegates are customary estates of inheritance holden of the lord of the manor by fines certain, rents of small amounts payable for each yearly, and certain dues, duties, suit, and service of right accustomed. That on death they descend to the heir, who is admitted at the lord's court, and pays a fine. That they pass by a customary deed, which is brought into the lord's court by the alienee, then presented by the jury or homage, and the alienee admitted: that he pays a fine, but no heriot. That the lord is entitled to seize quousque for non-payment of fines; and that, on alienation by a feme covert, she is examined by the steward apart from her husband. That the late Lord Lonsdale obtained a private Act of Parliament to enable him to enfranchise copyhold lands and hereditaments; and that, under the authority of it, he enfranchised several cattlegates; and that the owners of enfranchised cattlegates and unenfranchised can exercise and enjoy their right in the same manner, and that in the neighbourhood and in the manor the right is usually called stinted pasture, and sometimes common pasture. What is the proper inference to be drawn from the above facts? In my judgment it is, that the property and possession of the land and

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soil of Bretherdale Bank is in the plaintiff, and that the owners of the cattlegates have an incorporeal right to the exclusive pasturage of it—in fact, a right to be exercised on the plaintiff's land, the property and possession of the land itself remaining and being in him. It has been argued, that a grant of *vesturam terræ* means all the profits, or, in other words, the land itself; but this is contrary to Lord Coke, who says, “if a man hath twenty acres of land, and by deed granteth to another and his heirs *vesturam terræ*, and maketh livery of seisin secundum formam chartæ, the land itself shall not pass, because he hath a particular right to the land. Again, if a man grant *herbagium terræ*, and livery made, the soyle shall not pass.” He gives a variety of other instances where the grantee takes only a particular right or profit a prendre in the land, and explains that livery, being made secundum formam chartæ, cannot enlarge the grant. He concludes the passage by stating, that, by a grant of the profits of the land with livery, the whole land passes, for he adds, “what is the land but the profits thereof, for thereby vesture, herbage, trees, mines, and also whatsoever parcel of that land doth pass:” Co. Litt. 4. b. In page 122, after stating that it is the nature of a common that the owner of the land should take and enjoy his share of enjoyment in it, he proceeds thus: “A man may prescribe for or allege a custom to have and enjoy so-lam pasturam from such a day to such a day, whereby the owner of the soil shall be excluded to pasture or feed thereon; and so he may prescribe to have separalem pasturam, and exclude the owner of the soil from feeding there.” In a note to this passage (180), it is stated that the doctrine of Lord Coke has been the subject of much discussion; but that, in the last case, such a prescription was held good, and that since then, Lord Coke's doctrine has been generally acquiesced in. See also the note 6 to page 4. b.

It, therefore, seems to me that the legitimate conclusion to be drawn from the facts stated in the case is, that the

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plaintiff is the owner and possessor of the soil, and that the right of the defendant is an incorporeal right, in common with the other owners of the cattlegates, to the several pastures; and that the plaintiff, as owner and possessor of the soil, has a possessory property in the grouse and other game upon it.

It was said, that, in many parts of the north of England, the owners of cattlegates are the owners of the soil: it may very well be so. My judgment is confined to the facts stated in this special case. It may also be, that a question may arise as to the plaintiff's right to the cattlegates by reason of his ownership of the soil. This, however, does not at all affect the present question.

A very great number of cases were cited; but, in my view, the questions are really questions of fact, and there is no dispute as to the law applicable to them.

It has been urged as a reason that the ownership of the surface belongs to the owners of the several pasture, that they may maintain trespass. No doubt they can, but this is by reason of the exclusive ownership, and is assimilated in the books to free warren and free fishery, for an injury to which trespass may be maintained, although they are clearly incorporeal hereditaments: *Smith v. Kemp* (a).

I think, therefore, in answer to the questions proposed: First, that the plaintiff can maintain the present action against the defendant for killing and carrying away the grouse; and secondly, that the verdict ought to be entered for him on all the issues on the first and second counts; and as to the third, I decline to give any opinion.

PLATT, B., (after stating the facts,) said—It is laid down in Sheppard's Touchstone, page 97, that "If one be seised of twenty acres of land, and he grant to another and his heirs the vesture or the herbage of it, and maketh livery of

(a) 2 Salk. 637.

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seisin in it secundum formam chartæ; by this grant do pass the corn, grass, underwood, sweepage, and the like; and for these things the grantee may have an action of trespass for any wrong done to him in them. But hereby the land itself, the houses, and great trees thereupon, and mines therein, do not pass. But if a man so seised of twenty acres of land, grant to another all profits of this land, then the land passes." That is so laid down on the authority of Lord Coke. Common in gross is a liberty to have common alone, without any lands or tenements, on other persons' land, and may be granted by deed to a man and his heirs for life. By copy of court roll, tonsura prati may be granted in the same manner, so may the herbage, then the land passes (Roll. Ab. tit. "Copyhold" A.; Co. Litt. 58. b.) What evidence does the statement present, tending to shew that the customary right to the land was more extensive than this grant of herbage. The language of the admittance, which I take for granted corresponded with the deed, described the subject of the intended conveyance, the four cattlegates or beastgrasses in, upon, and over the close of pasture ground called Bretherdale Bank, purporting thereby that the defendant was admitted to the use of the herbage in, upon, and over Bretherdale Bank by the mouths of his cattle. In ordinary forms of pleading a common of pasture, the same language is adopted. Common of pasture is described "in, over, and throughout the locus in quo." Again, the enjoyment which has taken place, according to the case, corresponds with the restriction of the admittance for a time limited to the eating of grass by the mouths of the cattle without interfering with the soil. The piling up of stones for a wall fence, the reparation of the stone-fencing, and the abridgment of the time for turning off, which the owners in that case adopted inter se, are referable to the more beneficial use of the pasture. The plaintiff, his father, and their predecessors, lords of the manor, have always by themselves and by their gamekeepers and other persons authorised by them, searched for, pursued,

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and killed grouse and other game on and over Bretherdale Bank without obstruction from the cattlegate owners; and until the defendant shot the grouse, no other person claimed to be entitled to search for, pursue, or kill grouse or game over the place, except by stealth or by the leave of the lord. It also appears that a cattlegate owner killed game on the Bank, having previously obtained the leave of the lord; and, since 1819, they have always preserved the game and prevented persons unauthorised by them from killing grouse or game there. Now the Court is to draw any inference which a jury ought reasonably to draw from the facts; and upon these facts I am of opinion that the defendant was entitled to a right of pasturage only, in common with the other cattlegate owners; that he had no interest in the soil itself, and that although he might lawfully enter Bretherdale Bank for the purpose of turning on or driving off his cattle and sheep, or for the purpose of doing some act incidental to the exercise of his right of pasturage, yet that his entry on the close for the purpose of searching for and killing game there rendered him liable as a trespasser at the suit of the lord. A landlord may enter the demised premises of his tenant, if there be rent in arrear, and distrain: but if no rent is due, the entry for such a purpose is a trespass. The defendant has pleaded that the locus in quo was and still is his freehold; but by the custom he was only entitled to the grass during particular parts of the year, and as to cattle, for a limited number. What became of the property in the soil between the 24th of April and the 26th of May? Surely it was in the lord of the manor during that time; and it seems to me that it cannot be successfully contended, that during one part of the year the property in the soil was in the lord, and for the other part of it, in the cattlegate owners. In my opinion the property in the soil remained in the lord subject to the right of pasturage, to which the owners of the cattlegates were entitled. It seems to me, that the 1st & 2nd Will. 4, c. 32, is material to the question: that

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statute was the first Act which legalised the sale of game, and that enactment was passed to give the privilege specifically mentioned in it; for it is there stated, that, for the purposes of that statute, the word "game" shall include hares, pheasants, partridges, *grouse*, and so forth. And the 7th section of the Act (which seems to me to be declaratory of the rights of landlords), enacts "that in all cases where any person shall occupy any land under any lease or agreement made previously to the passing of this Act, except in the cases hereinafter next excepted, the lessor or landlord shall have the right of entering upon such land, or of authorising any other person or persons who shall have obtained an annual game certificate, to enter upon such land for the purpose of killing or taking the game thereon." It therefore appears from this, that the tenant must submit to the landlord's entry by himself or his gamekeepers for the purpose of killing the game, unless it is specifically granted to the tenant by the terms of his lease, or provided for by the terms of the lease that he shall not be fined. Now this Act contains a remarkable section, which seems to have pointed out or to have contemplated a case of this kind. That is the 10th section, which is as follows:—"Provided also and be it enacted, that nothing herein contained shall be deemed to give to any owner of cattlegates, or rights of common upon or over any wastes or commons, any interest or privilege which such owner was not possessed of before the passing of this Act, nor to authorise such owner of cattlegates or rights of common to pursue or kill the game found on such wastes or commons; and that nothing herein contained shall defeat or diminish the rights or privileges which any lord of any manor, lordship, or royalty, or reputed manor, lordship, or royalty, or any steward of the Crown of any manor, lordship, or royalty appertaining to his Majesty, may, before the passing of this Act, have exercised in or over such wastes or commons, and that the lord or steward of the Crown of every manor, lordship, or royalty, or reputed manor, lordship, or royalty, shall have the right

to pursue and kill the game upon the wastes or commons within such manor, lordship, or royalty, or reputed manor, lordship, or royalty, and to authorise any other person or persons who shall have obtained an annual game certificate to enter upon such wastes or commons for the purpose of pursuing and killing the game thereon." Now there is no evidence of any right on the part of the cattlegate owners. The present defendant is the first that ever ventured to kill grouse in defiance of the lord. There is an entire absence of any evidence of a right in him; and therefore it seems to me, that this section bears very strongly upon the case, and, inasmuch as there is no evidence of a right pre-existing in the defendant, the right is in the lord. It seems to me that, since the passing of this Act, "game" comes under a very different consideration, and especially game of this kind, grouse. It is made property, and may be bought and sold legally. The lord of the manor may direct his gamekeepers to shoot the grouse, and may sell them—they may be sold by auction—they are now, for the purposes of the lord, property. Nobody can doubt that trover would lie for dead grouse, or that an indictment would lie for stealing a quantity of grouse from a poulterer's. Now, applying the doctrine laid down in *Sutton v. Moody* (a) by Lord Holt, that, where a man pursues game in B.'s land and kills it in B.'s land, the bird or the deer that is killed is the property of B., since he has a possessory though not an absolute right in it while it is upon his domain; here the grouse being pursued and killed within the Bretherdale Bank, (if I am right in saying it was the lord's soil alone,) the possessory right was in the plaintiff, and when the grouse fell, the property was complete in him. It seems to me, upon this case, that there is evidence not only of the defendant not having any right at all, but also that there is evidence of an exclusive right on the part of the plaintiff. I therefore think the present action may be maintained for the entering and pursuing and

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(a) 1 Ld. Raym. 250.

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killing the game; and also that the count in trover is maintainable, and that all the issues ought to be found for the plaintiff.

ALDERSON, B.—There are three questions in this case. First, whether the plaintiff can maintain an action of trespass against the defendant for entering his close called Bretherdale Bank, and pursuing, killing, and carrying away grouse and other game there; secondly, trover for the plaintiff's dead grouse; and thirdly, for disturbing the plaintiff's exclusive right of shooting in Bretherdale Bank.

I am of opinion that he cannot do this. The first, and indeed I think the only material question solely depends on the nature of the defendant's estate. The locus in quo, called Bretherdale Bank, is a separate pasture divided from the adjoining waste of the lord of the manor (the plaintiff) by a fence. This pasture is stinted and appropriated amongst the owners of eighty cattlegates, as they are called, belonging to various individuals. These owners maintain the fence of separation, each in proportion to his number of cattlegates. The majority of the body arrange and change the times of turning on the cattle to which each is entitled; which it is difficult to see how they could do if their rights were only rights of pasture, given and limited by the lord's grant. In fact, however, they do exercise all the rights they are capable of, which are incidental to their limited estate on the land itself, of which they are joint owners. In all this, the lord of the manor has no right of interference. It is found in the case, that, when they altered the time of the stint, they gave him no notice, and that there is nothing about stinting in the court-rolls, which presumably there would be if the right of pasture was a mere grant from him. They fence and keep up the fence against his adjoining common. These cattlegates, moreover, are customary tenements; some of them are still holden of the plaintiff's manor, some have been enfranchised and are freehold. They pass by customary conveyance,

which, as Lord *Mansfield* says in *Rex v. Whitley* (a), is a proof that they are tenements, and relate to the land itself. In fact, these are clearly copyhold tenements, as I think, and are subject to the same rights and liabilities as copyhold estates. They are holden of the plaintiff, and may be—some of them have been—enfranchised by him. He himself holds some of them as his own separate property. Then, what are they? In one sense, no doubt they are not the land, for they are only a part of it, like the mines or any other part of it. But they are a part of the land, and consist of the exclusive right to that part of it which consists of the whole surface or vesture of the land; and the owners have the right of excluding every other person from intruding thereon. No doubt, it is laid down by Lord Coke—and his opinion is, after a good deal of doubt, now held to be good law—that a man may prescribe for such a tenement; but this prescription seems a sort of anomaly; and even when it so passes, the right acquired is at least a good bar to trespass brought by the lord himself: *North v. Cox* (b). It is unnecessary I think to discuss this part of the case, for here the cattlegate passes by customary conveyance, and is held without all doubt as a copyhold tenement under the lord himself.

Now, what rights follow from such a possession of a part of the land? If mines are granted, then is there granted only a partial interest in the land; but, nevertheless, trespass may be maintained by the grantee against the grantor for breaking and entering them. Wherever there is an exclusive right to the immediate possession of a tenement of this sort, trespass may be maintained for breaking and entering it. In this case, therefore, the grantee of the *sola vestura* or the *sola pastura* may exclude the lord; and this, as appears from the argument of the Attorney-General *North*, was a grave reason why it was for a time contended that it could not pass by prescription.

(a) 1 T. R. 137.

(b) 1 Lev. 253.

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I think, therefore, that in this case the whole surface of the soil was a tenement of which the defendant was one of several joint tenants. That this body of joint tenants hold the whole, exclusively of the plaintiff as lord of the manor; and consequently, that the plaintiff, who, as lord of the manor, has no right at all on the surface of the land, cannot maintain an action for a trespass thereon against the defendant, who has himself the right, as a joint tenant, to do what he has done as a right belonging to the enjoyment of the whole surface granted and held as a tenant of the plaintiff.

In this case, the lord is also one of the joint tenants himself, but no one suggests that that can alter the case unless it be in the defendant's favour.

As to the second point, I do not believe that we entertain any difference of opinion. There is no claim of free-warren set up by the plaintiff. The property in grouse shot by the defendant is not therefore, by anything stated in this case, shewn to be in the plaintiff, which is the point in issue, unless the plaintiff is himself solely entitled to the right in the land.

As to the third point, whether the plaintiff has shewn by the facts stated in the case an exclusive right of shooting over the locus in quo.—I think he has not. My opinion as to the first point has been already stated, and the reasons for it. Supposing that opinion to be a correct one, the defendant is one of several joint tenants holding a tenement jointly with other owners of cattlegates, which consists of a right to all the profits of the surface of this stinted pasture, and the right jointly with others to maintain trespass against any one trespassing on the surface thereof, and even against the lord of the manor himself. Is there anything here to shew that, by adverse usage, the lord here has obtained an easement, the exclusive right of shooting over this surface? It is true that he has shot over this surface, but he, being an owner of cattlegates, had a right arising out of

that ownership of doing so. It may be said, however, not by his gamekeeper or by others, which has been done; and one owner of a cattlegate once, it seems, asked leave and obtained it. But there is no suggestion that any owner of cattlegates has ever been prevented by the lord from shooting. Probably, no one has ever wished to do so. The universal tradition in these districts, and almost throughout all England was, that lords of the manor could shoot everywhere, over wastes and copyholds alike; and the nature of the distinction between wastes and stinted pastures, the rights of the commoners in the one being an easement, the soil remaining in the lord, and those of owners of cattlegates being tenements held of the lord, including a limited ownership of a part of the soil itself, is so fine, that any usage on the part of the lord, such as this, is not of the least weight at all. If we add that the power of this plaintiff and his ancestors is well known by all to have been almost unlimited, we shall, I think, be not much disposed to treat this evidence of usage as worthy of the slightest attention. I think the case entirely depends on the nature of the property itself, and that the decision on the first point contains in reality a decision on the whole case,—as I am confident would be the opinion of any twelve men selected indifferently from either Westmoreland or Cumberland, without a moment's doubt.

I think, therefore, that our judgment should be for the defendant.

His Lordship added: The Lord Chief Baron who heard this argument desires me to say, that, having read the written judgments on both sides, he concurs with me in the view I take; consequently, the Court is equally divided. It is to be desired that the case should go further if the parties wish it.

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C. & Co., the owners of a brig, wrote to the plaintiffs, merchants at New Orleans, to procure a freight for the vessel, stating that if the plaintiffs accepted a charter for Great Britain, they preferred the captain drawing against freight. In this letter was inclosed a letter from C. & Co. to the captain, in which they referred him to the plaintiffs to procure a charter for the vessel. The captain shewed his letter to the plaintiffs, and asked them if they would draw on account of freight, and they said they would. The vessel was loaded as a general ship for Liverpool, and was intended to be consigned to M. & Co.; the plaintiffs wrote to C. & Co., informing them that the vessel was being loaded as a general ship, and stating that they would draw upon the freight for the amount of disbursements. The captain accordingly drew on M. & Co., requesting them to charge the same to account of freight. M. & Co. refused to accept the draft, and it was indorsed to G. & Co., the plaintiffs' agents, who effected an insurance on the freight. The vessel was lost by perils of the seas on her voyage from New Orleans to Liverpool. In an action by the plaintiffs on the policy:—*Held*, that the plaintiffs had an insurable interest, and that it was correctly described as "advance on account of freight."

THE declaration stated that the plaintiffs, by Gibbs, Bright & Co., their agents in that behalf, caused to be made a certain policy of insurance.—The declaration then set out the policy, by which an insurance of 500*l.* was made "from New Orleans to Liverpool upon any kind of goods and merchandises, and also upon the body, tackle, apparel, &c. of and in the good ship or vessel called the *Cambysea*," &c. The policy stated that "the said ship, &c., goods, and merchandise, &c., for so much as concerns the assured by agreement between the assured and assurers, in this policy are and shall be valued at — on advance on account of freight," &c. The declaration then stated, in the usual form, the payment of the premium and the subscription of the policy; and it averred that goods were shipped at New Orleans on board the said ship, to be carried therein on the said voyage for freight; and that "the plaintiffs were then and from thence continually afterwards, until and at the time of the loss, interested in the said advance on account of freight in the policy mentioned, and the said freight, to a large amount, to wit, to the amount of all the monies by them ever insured or caused to be insured thereon." The declaration then stated that the ship, with the said goods on board, sailed from New Orleans, and whilst proceeding on her voyage to Liverpool was wholly lost by perils of the seas.—Breach: nonpayment of the sum insured.

Pleas: first, that the plaintiffs were not interested in manner and form as in that behalf alleged. Secondly, that the supposed advance on account of freight and the

said freight did not by the perils of the seas become lost to the plaintiffs as alleged.—Upon which issues were joined.

The cause came on for trial before *Platt, B.*, at the Liverpool Summer Assizes, 1854, when a verdict was found for the plaintiffs, subject to the opinion of the Court on the following case :—

The plaintiffs are merchants at New Orleans in the United States, and the defendants are underwriters at Liverpool. Messrs. Crane & Co. of St. John's, New Brunswick, became owners of the brig "Cambyeses," and placed her under the command of Captain Robert Wilson. The vessel arrived at New Orleans in November, 1852, and the plaintiffs, acting as agents for the ship, discharged her inward cargo and procured her an outward freight. Previous to the ship's arrival, her owners had written to the plaintiffs as follows :—

"Messrs. Joseph Wilson & Co., New Orleans.

"St. John N. B., 19th Oct., 1852.

"Gentlemen,—We have been informed by Captain Robert Wilson of our brig 'Cambyeses,' that it became necessary for him to proceed from Jamaica to your port; and having been advised to put the vessel in your hands, we obtained a few lines from our friend J. Irich, Esq., to which we beg reference, as the captain does not know who his consignee is. We will thank you to observe whether he has arrived on receipt hereof, and as soon as he can be found give him the inclosed letter: he probably wishes the vessel chartered, and we will thank you to use your best exertions to procure a good fit. Mr. Irich thinks, as the vessel is small, that staves to Cadiz would be best. For any disbursements, Captain Wilson's bill on Messrs. Boyson, London, will be honoured: if you accept a charter for Great Britain, we prefer the captain drawing against freight, if not prejudicial to the vessel's interest.

"We are &c., CRANE & Co."

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The letter from the owners to the captain, inclosed in the last letter, and which was immediately on his arrival communicated by the captain to the plaintiffs, is as follows :—

“ Capt. Robert Wilson,

“ Brig Cambyzes, New Orleans.

“ St. John N. B., 19th Oct., 1852.

“ Dear Sir,—Yours, 5th inst., from Jamaica, came to hand this morning. We are sorry to hear of the detention at Port Maria. Now that you are in New Orleans, it will not suit for you to leave there without the best freight to be had. Having had so many difficulties, you must be very cautious on chartering your vessel, and in every step you take. There are freights frequently for Havre and other ports on the continent of Europe, also for Liverpool, Glasgow, and sometimes stores for Cadiz and also Oporto. Now, it will not suit for you to accept a charter for France, or any place including Oporto on the continent of Europe, for you could not procure any return freight. Unless you wish to try and sell the vessel, Glasgow would be preferable to Liverpool, for you would probably fill up sooner and be sure of a return freight to the States @ 22s. 6d. per ton, as we have no doubt you could procure a better freight of spring goods for this place. We think Cadiz would be the best route if you could procure a freight there, for you would be almost sure of a salt freight to Boston; besides, the wear and tear would be less than on the English coast. We are strongly recommended to Messrs. Joseph Wilson & Co., and think that you had better put the vessel in their hands. We have written to them on the subject and they will be able to advise you about Cadiz or any other freights. Should you go to Cadiz, draw for your disbursements on Messrs. Bagen & Co., London; or if you charter for Great Britain, and there is any advantage to you in not drawing against your freight draw on them,

who we have instructed to accept your bills. We shall insure your freight. "We are &c., CRANE & Co."

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At the time when this letter was shewn to the plaintiffs, the captain asked them if they would draw on account of freight, and the plaintiffs said they would.

On the 12th of November, 1852, the plaintiffs wrote to Crane & Co. in answer to their letter of the 19th of October, stating that they would procure a freight for the *Cambyses*. The vessel was loaded as a general ship for Liverpool at freights payable in Liverpool, and was intended to be consigned to Messrs. Malcomson & Co. at Liverpool, and who were to do the ship's business in the usual course. She sailed from New Orleans for Liverpool on the 24th of December, 1852, and was on the 12th of January, with her cargo, wholly lost on the voyage by perils of the seas. The plaintiffs at New Orleans had disbursed the ship, and had paid on account thereof the sum of 596*l.* 3*s.* 3*d.*

Messrs. Gibbs & Co., merchants at Liverpool, were the usual correspondents there of the plaintiffs, and they allowed the plaintiffs a credit with them for advances to a certain extent.

On the 4th of December, 1852, the plaintiffs wrote to Messrs. Crane & Co. informing them that the "*Cambyses*" was being loaded as a general ship. This letter contained the following passage:—"We will draw upon the freight for the amount of disbursements as you request Captain Wilson we should do." This letter was received by Crane & Co. at St. John's on the 18th of December.

"Messrs. Malcomson & Co., Liverpool.

"New Orleans, Dec. 23rd, 1852.

"Gentlemen,—I have this day drawn on you at sixty days sight for 596*l.* 3*s.* 3*d.* sterling in favour of Messrs. Joseph Wilson & Co., which please protect, and charge the same to account of freight inwards for brig '*Cambyses*,'

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under my command, and consigned to your address.—Please effect insurance on the freight of said brig sufficient to cover the draft.

" I am &c., ROBERT WILSON.

" P. S.—Should the drawees refuse to accept the within-mentioned draft, the order for insurance to them herewith transmitted is annulled, and is hereby transferred to the holders of the said bill.

" Gibbs & Co.

ROBERT WILSON."

" Messrs. Gibbs & Co.

" New Orleans, 23rd Dec. 1852.

" Gentlemen,—We beg to inclose Captain Robert Wilson's exchange on Messrs. Malcolmson & Co. at sixty days sight for 596*l.* 3*s.* 3*d.*, on account of freight for brig 'Cambyeses,' consigned to them. When paid, please credit on account.

" We are &c.,

" JOSEPH WILSON & Co."

The bill of exchange was in these terms :—

" Exchange for 596*l.* 3*s.* 3*d.* sterling.

" New Orleans, Dec. 23rd, 1852.

" Sixty days after sight of this first of exchange (second and third unpaid) pay to the order of Messrs. Joseph Wilson & Company in London Five Hundred and Ninety-six pounds 3*s.* 3*d.* sterling, value received, and charge the same to account of freight inwards for brig "Cambyeses."

" To Messrs. Malcolmson & Co. " ROBERT WILSON."

(Indorsed.)

" Pay to order of Messrs. Gibbs, Bright & Co.

" JOSEPH WILSON & Co."

" Messrs. Crane & Co.

" New Orleans, Dec. 23rd, 1852.

" Dear Sirs,—We are at length enabled to advise you the 'Cambyeses' is loaded and ready for sea. We now beg

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to inclose you amount of freight list, 1126*l.* 12*s.* 6*d.* sterling, the particulars of which Captain Wilson informs us he has already sent you. We also inclose you copy of disbursements account, amounting to \$2854 9*s.* 6*d.*, for which we have taken Captain Wilson's exchange on Messrs. Malcolmson & Co., the consignees of the freight, for 596*l.* 3*s.* 3*d.* sterling at sixty days, which we have no doubt will meet due honour. Captain Wilson has written those gentlemen to insure sufficient to cover the amount of this bill. The balance of insurance, Captain Wilson says, you will attend to as you think best. We have drawn upon Gibbs & Co. for disbursements, and sent them Captain Wilson's bill on Messrs. Malcolmson. "We are &c.,
"JOSEPH WILSON & Co."

The above letter was received by Crane & Co. at St. John's on the 6th of January, 1853. Messrs. Gibbs & Co. received the plaintiffs' letter inclosing the bill for 596*l.* 3*s.* 3*d.* in due course, and it was presented to Messrs. Malcolmson on the 17th of January, 1853, and acceptance was refused by them, and the bill was in the hands of Gibbs & Co. unpaid, but has since been taken up by the plaintiffs.

The captain of the "Cambyses" requested the plaintiffs to get a freight for him for the vessel to Liverpool, and requested them to draw on account of the freight for the disbursements, and produced to the plaintiffs the letter to him from his owners. The ship was loaded as a general ship, and the plaintiffs paid her disbursements. The letter of the captain to Messrs. Malcolmson, dated the 23rd of December, was written at the request and under the direction of one of the plaintiffs, the ship being then intended to be consigned to Messrs. Malcolmson, and the postscript of that letter was also written at his express desire. The premium on the insurance was debited to the plaintiffs and paid by them. They have never been paid the disbursements on

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the bill. This was the first transaction the plaintiffs had with Crane & Co. The vessel came from Jamaica consigned to the plaintiffs and seeking freight, and the plaintiffs acted in the ordinary way, under such circumstances, by the authority of Crane & Co. in getting freight and making disbursements, and took the bill for the disbursements against the freight.—The Court may draw any inferences of fact which a jury might draw.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover in this action the amount of the defendants' subscription. If the Court shall be of that opinion, then the verdict is to stand for such sum, but if the Court shall be of a contrary opinion, the verdict is to be entered for the defendants.

Edward James (Milward with him) for the plaintiffs.—Three objections are raised to the plaintiffs' right to recover. First, that they had no insurable interest; secondly, that, if they had, it is incorrectly described in the policy "advance on account of freight;" and thirdly, that the plaintiffs had lost nothing by the loss of the ship and cargo. First, the plaintiffs had an insurable interest. The letters of the 19th October, from Crane & Co. to the plaintiffs and the captain of the vessel, authorised the latter to draw against freight on account of advances made by the plaintiffs; and when he did so, that operated as an equitable assignment of the freight to the extent of the plaintiffs' disbursements. The word "charter" in those letters is not used in the strict legal sense of "charterparty." The plaintiffs' letter to Crane & Co. of the 4th December, shews that the plaintiffs understood that the authority to draw against freight was not limited to the case of a charterparty, but extended to a general cargo. It is clear that the captain, also, so understood it; for, on the 23rd December, he wrote to Malcolmson & Co., informing them of his draft, and requesting them to "charge the same to account

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of freight." Moreover, the bill itself, on the face of it, purports to be a charge on the freight. But even assuming that the authority of the captain was limited to the case of a charterparty, yet if the plaintiffs made the advances under the impression that it was not, and Crane & Co. did not repudiate the act of the captain, that amounted to a ratification of it. A draft by a debtor directing payment to his creditor out of a particular fund is in equity an assignment of so much of the fund for a valuable consideration, and will prevail against the assignees under a bankruptcy of the debtor: *Row v. Dawson* (a), *Yeates v. Groves* (b). So, where a trader gave to a creditor an order on the executor of her debtor to pay the debt to the creditor, and the executor having received the order retained it until the assets of the testator should enable him to pay simple contract debts, and the trader became bankrupt before payment, the creditor was declared entitled to receive the amount of the order from the executor notwithstanding the bankruptcy of the trader: *Ex parte South* (c). Lord *Eldon*, C., there said, "It has been decided in bankruptcy, that, if a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shewn to the debtor, it binds him; on the other hand, this doctrine has been brought into doubt by some decisions in the Courts of law, who require that the party receiving the order should, in some way, enter into a contract (d). That has been the course of their decisions, but is certainly not the doctrine of this Court." *Lett v. Morris* (e) is an authority to the same effect. The doctrine was recognised and acted on in *Burn v. Carvalho* (f), where

(a) 1 Ves. sen. 331. For a further statement of the facts of this case, see the judgment of Lord *Truro*, C., in *Rodick v. Gandell*, 1 De G., M'N., & G. 774.

(b) 1 Ves. jun. 280.

(c) 3 Swanst. 392.

(d) See *Israel v. Douglas*, 1 H. Bl. 239; *Legh v. Legh*, 1 Bos. & P. 447; *Tatlock v. Harris*, 3 T. R. 180.

(e) 4 Sim. 607.

(f) 4 Myl. & Cr. 690.

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Lord *Cottenham*, C., says, "In equity, an order given by a debtor to his creditor upon a third person having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund." Those authorities shew that in this case there was a valid equitable assignment of the freight to the extent of the plaintiffs' advances, and consequently they had an insurable interest.—Secondly, the interest is properly described in the policy. A party who has only a special interest in goods may recover, in respect of that interest, on a general insurance effected for his benefit: *Palmer v. Pratt* (a), *Sutherland v. Pratt* (b). That being so, the case of *Hall v. Janson* (c) is decisive on this point, for there the interest of a general owner of freight, to whom advances had been made, was held to be sufficiently described as "money advanced on account of freight." Lord *Campbell*, C. J., there says, "Great latitude is allowed in describing the interest in a policy of assurance, provided that the nature of it is intelligibly disclosed." [*Martin*, B., referred to *M'Swiney v. The Royal Exchange Assurance* (d).]—Thirdly, by the loss of the ship and cargo the plaintiffs have been deprived of the security which they would otherwise have had from the freight.

Wilde (*Hugh Hill* with him) for the defendant.—First, the captain had no authority to draw against freight, unless the vessel was chartered. "Drawing against freight" means drawing in anticipation on the person who has contracted to pay it. But the ship was loaded as a general ship, and the captain has not pursued his authority by drawing on *Malcolmson & Co.* They had no insurable interest in the freight. If they had accepted the bill of exchange, they would have been bound to pay it, whether the ship arrived or not; and if it had arrived, the captain

(a) 2 Bing. 185.

(b) 12 M. & W. 16.

(c) 4 E. & B. 500.

(d) 14 Q. B. 634.

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would have had a right to receive the freight. Therefore, admitting the proposition to be correct, that an order given by a debtor to his creditor upon a third person who owes the debtor money operates as an equitable assignment of the debt, that does not apply here, because Malcolmson & Co. never owed the shipowners any money for freight. There could be no equitable assignment of the freight except by order on the persons who were liable to pay it. *Rodick v. Gandell* (a) is an express authority that an order by a debtor to a third person to *receive and pay over* to the creditor money due to the debtor does not amount to an equitable assignment of the debt. Lord *Truro* there observes, that the extent of the principle to be deduced from the authorities is, "that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund,—in other words, will operate as an equitable assignment of the debts or fund to which the order refers." Here there is no order on a person owing money or holding funds belonging to the giver of the order, but merely on persons who were supposed to be authorised to collect the freight. [*Pollock*, C. B.—Suppose a landlord agreed with his creditor to pay him a debt of 100*l.* out of some rent about to become due, and the landlord gave his steward an order to that effect, would not that amount to an equitable assignment of the rent?] The order should be on the tenant. Where a charterparty provided that the captain was to be supplied with cash for the ship's use, and in pursuance of that stipulation the master drew a bill on the freighters, which was duly accepted and paid, that was held not to be a payment of freight in advance, but a loan to the owner of the ship,

(a) 1 De G., M'N. & G. 763.

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and that the freighters had no insurable interest in such bill: *Mansfield v. Maitland* (a). In *Wilson v. The Royal Exchange Assurance Company* (b), Lord *Ellenborough* ruled, that a policy of insurance on money lent to the captain payable out of the freight was not an insurable interest, and that the policy was illegal on the face of it. [*Pollock*, C. B.—That proceeded on the ground that the insurance would tend to render the captain less careful.]—Secondly, assuming that the plaintiffs had an insurable interest, it is incorrectly described in the policy. If the freight has been assigned, it should have been described as “freight:” *Palmer v. Pratt* (c). “Money advanced on account of freight” means freight paid in advance to the shipowner.—Thirdly, the plaintiffs have sustained no loss by the loss of the ship and cargo. The intention of the parties was, that the plaintiffs should have the security of the captain and shipowners, and the insurance was effected for the purpose of protecting the latter in respect of their liability to the plaintiffs. If the transaction had been completed by *Malcolmson & Co.* accepting the bill, the plaintiffs would have had no claim on the freight, but must have resorted to their remedy on the bill.—(He also referred to *Arnould on Insurance*, 274.)

POLLOCK, C. B.—The plaintiffs are entitled to judgment. The question depends on, whether there was an agreement that the freight should be liable for advances made by the plaintiffs. I am of opinion that there was, with this limitation, that they should be advances in respect of which the captain drew against freight. In endeavouring to ascertain the intention of the parties, we must look to the object of the policy. Now, by the letter to the plaintiffs of the 19th October, the defendants say, “If you accept a charter for Great Britain, we prefer the captain drawing against

(a) 4 B. & Ald. 582.

(b) 2 Camp. 626.

(c) 2 Bing. 185.

freight." It is argued, that, at any rate, that cannot apply to the present state of facts, because there was no charter-party. No doubt, at that time it was not intended that the ship should be disposed of as a general ship; but the question is, whether the owners did not mean that the captain should draw against freight, not merely if the ship was chartered, but if she was to come to Great Britain. I am of opinion that they did; and they empowered him to communicate that authority to the plaintiffs, and thereby induced them to make advances upon the security of the freight; and accordingly a bill is drawn which distinctly pledges the freight. That operated as an equitable assignment of the freight, and consequently the plaintiffs had an interest in it to the extent of their disbursements. Then it is objected, that their interest is incorrectly described as "advances on account of freight." But the question is, what is the construction to be put on these documents, coupled with the fact, that there was an intention on the part of the owners of the vessel to pledge the freight, and to hold out that as an inducement to the plaintiffs to make advances. I think that the plaintiffs' interest is properly described as "advances on account of freight." The verdict for the plaintiffs must therefore stand.

ALDERSON, B.—I am of the same opinion. It is a question whether, under the circumstances of the case, the captain was authorised to draw against freight; and I am of opinion that he was.

MARTIN, B.—I am of the same opinion. It seems to me a fair inference for a jury to draw from the letter of the 23rd December, 1852, that the plaintiffs had an insurable interest in the freight. This letter has a double aspect; it was written by the captain to Malcolmson & Co. to induce them to accept the bill, and in case of their refusal, it transfers the order for insurance to the holders of the bill.

Judgment for the plaintiffs.

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Jan. 22. WALL v. THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Where the jury, being unable to agree upon their verdict, are discharged by the Judge, and the plaintiff afterwards discontinues, the defendant is not entitled to the costs of the trial.

THIS cause was tried before *Coleridge, J.*, at the Winchester Summer Assizes, 1854, when, the jury being unable to agree upon their verdict, the learned Judge, of his own authority, and without the consent of the parties, discharged them. The plaintiff afterwards obtained a rule to discontinue on payment of costs. The Master, in taxing the defendants' costs, disallowed them the whole of the costs of the trial, including fees to counsel and money paid to witnesses, &c.

Bovill now moved for a rule, calling on the plaintiff to shew cause why the Master should not review his taxation. —First, the defendants are entitled to the entire costs of the trial. The Master taxed the costs on the principle laid down in *Seely v. Powers (a)*, viz that where a Judge, of his own authority, discharges a jury from giving a verdict on the ground of their not being able to agree, the party ultimately successful will not be entitled to the costs of the first attempt at trial. *Waite v. Spurgin (b)* is an authority to the same effect. But in *Gray on Costs*, p. 377, it is said, "The correctness of these decisions may, however, be well doubted; for, after the discharge of the jury in such a case, the effect is that the cause is a remanet. If, after the jury has been discharged, there be time remaining to try the cause, there seems no objection to impannelling another jury, and trying it; and if this be not done only because there is not time, the cause is strictly a remanet." [*Pollock, C. B.*—In *Brown v. Clarke (c)*, Lord Abinger said,

(a) 3 Dowl. P. C. 372.

(b) 4 Dowl. P. C. 575.

(c) 12 M. & W. 25.

"We find that the practice of the Court of Queen's Bench has been in accordance with the decision of my Brother *Patteson* in *Seely v. Powers*; and not being inconsistent with reason, or with any rule or practice of this Court, and the case being analogous to that of a venire de novo, we think it best to adhere to it, and to say, that wherever, by the fault or defect of finding by the jury on the first trial, the parties have gone to trial a second time, the party ultimately successful is entitled only to the costs of the trial in which he succeeds." *Alderson*, B.—One evil which formerly prevailed was, that the practice of the Courts of common law was different; latterly, the object has been to make the practice uniform; but if we depart from it in this case, we shall be introducing the very evil we have endeavoured to prevent.] In *Harrison v. Bennett* (a), one of the jury having absconded before the verdict was delivered, and the Judge having discharged the rest, it was held that the plaintiff, who succeeded on the second trial, was entitled to the costs of the first.—Secondly, at all events, the defendants are entitled to all the costs except the costs of the day. Where, after verdict for the defendant, a new trial was granted, and the plaintiff, after giving a fresh notice of trial, discontinued, it was held that the defendant was entitled to the costs of matters available on the second trial, although such costs had been incurred in the preparation for the first trial: *Daniel v. Wilkin* (b). The costs of matters available on a second trial are costs in the cause: *Lord v. Wardle* (c).

POLLOCK, C. B.—There ought to be no rule. *Harrison v. Bennett* (a) has certainly an aspect in favour of the application. But that case was followed by *Seely v. Powers* (d) and *Brown v. Clarke* (e), in the latter of which the subject

(a) 1 Dowl. P. C. 627.

(b) 8 Exch. 156.

(c) 6 Dowl. P. C. 174.

(d) 3 Dowl. P. C. 372.

(e) 12 M. & W. 25.

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was distinctly brought before this Court, and it was held that the party who had succeeded on a second trial was not entitled to the costs of the trial where the jury had been discharged. I think that that was the proper course; and I disagree with the view taken by Mr. Gray in his book on costs. But even if he is right, since the practice has been established for nearly twelve years, and it is the settled practice of the Court of Queen's Bench, it would be wrong in us to alter a practice which has been so long acted on. There will, therefore, be no rule, the Master having taxed the costs in accordance with the established practice.

ALDERSON, B.—I also think that there ought to be no rule, since I find that the practice is settled; but if the question were to come before all the Judges my vote would be in favour of altering it.

PLATT, B.—I am of the same opinion.

MARTIN, B.—I agree with the rest of the Court. The case of *Brown v. Clarke* is decisive of the question. With respect to the second point, I do not see what rule we can follow except that of disallowing all the costs of the trial.

Rule refused.

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ALEXANDER HEWSTON *v.* PHILLIPS,
JANE HEWSTON *v.* SAME.

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THE plaintiff in each of the above cases had entered a plaint against the defendant in the County Court of Lancashire holden at Liverpool. In the first of these plaints the particulars of demand were as follows:—"The plaintiff claims the sum of 50*l.* for a legacy of the sum of 100*l.* left to the plaintiff by the will of W. Mackay, dated the 26th of December, 1838. And the plaintiff abandons the excess beyond the sum of 50*l.*" In the second of the above plaints the plaintiff, by her particulars of demand, claimed "the sum of 50*l.* for a legacy of 50*l.* left to the plaintiff" by the same will. The plaints were tried by a jury, when it appeared that W. Mackay by his will bequeathed all his estate and effects to the defendant in trust to sell the same, and in the first place to pay debts, &c.; and he directed his said trustee to stand possessed of 100*l.* in trust for his nephew Alexander Hewston, and that the said sum should be invested on such security at interest as his said trustee should think proper, and the interest thereof paid to his nephew until he attained the age of twenty-one, and on his attaining that age the testator bequeathed to him the said sum of 100*l.* absolutely. Then followed a power for the trustee, if he should think fit, to apply the whole or any portion of the 100*l.* towards the apprenticing or placing out of the testator's nephew to any trade or business, or otherwise for his education or advancement. The testator then bequeathed to each of his nieces, Fanny Hewston and Jane Hewston, the sum of 50*l.*; and he directed that those sums should be retained by his trustee or invested by him in some bank or on security at interest, and that the interest should be paid to or for the use of his nieces until they attained the age of twenty-one or married; and that, in either of

A bequest of money in trust to invest the same during the minority of an infant, and pay it to him when of age, with power to apply it towards his education or advancement, is not a "legacy" within the County Courts Act, 9 & 10 Vict. c. 95, s. 65.

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those events, the 50*l.* should be paid to them. There was a similar power for the trustee to advance the whole or any part of the legacy given to the nieces towards the education and bringing up or placing them out to any business for their advancement in the world. Then followed a devise of the residue in trust to pay certain annuities. When the testator died the cestui que trusts were infants, and having come of age they entered these plaints. The defendant had advanced money to the mother of the niece for her support.

It was objected on behalf of the defendant in each plaint that these bequests were not "legacies" within the meaning of the 9 & 10 Vict. c. 95, s. 65, and consequently that the county court had no jurisdiction. The judge overruled the objection, and verdicts were found for the plaintiffs, in the first plaint with 50*l.* damages, and in the second with 25*l.* damages.

Milward now moved in each case for a rule calling on the plaintiff and the judge of the county court to shew cause why a writ of prohibition should not issue to restrain the judge from further proceeding in the plaint.—The question depends on the 9 & 10 Vict. c. 95, s. 65, which provides that the jurisdiction of the county court shall extend to the recovery of any demand not exceeding 20*l.* "which is the whole or part of the unliquidated balance of a partnership account, or the amount or part of the amount of a distributive share under an intestacy, or of the legacy under a will." The subject matter of these claims is not a legacy, but a bequest in trust. The testator bequeaths 100*l.* to the defendant, upon trust to invest the same until his nephew shall attain the age of twenty one, with a discretionary power to apply the whole or any part of the money towards the apprenticing of his nephew; and the gift to his niece is in similar terms. [*Alderson*, B.—An account must first be taken of the assets and debts, and the plaintiff

can only be paid out of the surplus. There may not be any surplus; but that cannot be known until the account is taken. That is the reason why an action at law will not lie for a legacy.] The county court cannot deal with these bequests unless it has before it all the legatees under the will.

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Aspland shewed cause in the first instance.—According to the plain language of the 65th section of the 9 & 10 Vict. c. 95, the county court has jurisdiction over these complaints. The same objections would apply to a claim to a distributive share under an intestacy, and yet it is clear that such a claim may be recovered in the county court. In *Pears v. Wilson* (a), real and personal property was left by will to executors, upon trust to sell, and, after paying certain legacies, to divide the residue among certain persons; and a share in such residue was held to be a legacy, in respect of which the county court had jurisdiction to enforce payment. There *Parke*, B., in delivering the judgment of the Court, says, “We have consulted Lord *Cranworth* upon the question, and he agrees with us in thinking that this is a legacy. In truth, every legacy includes a trust, for in a certain sense it is a trust in the executor to pay it to the legatee.” [*Alderson*, B.—In that case the executor had nothing to do but to pay over the money to the persons entitled to it: here there is a trust to be performed.] The gift to the defendant constituted him an executor: *Story’s Equity Jurisprudence*, sect. 1067; *Williams on Executors*, 196, 4th edit. [*Alderson*, B.—How can a plaintiff abandon the excess above 50*l.* where the claim is against an executor? Abandonment means a relinquishment in favour of a person who is to keep what is given up; but an executor who is a trustee is bound to administer the estate.]

(a) 6 Exch. 833.

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Milward in support of the rule.—In the case of *In re Fuller* (a), *Crompton*, J., says, “The distinction suggested in *Pears v. Wilson* (b) is between a bequest of a legacy, where there is no further trust than the simple one imposed on an executor to pay it, and a bequest in trust.” In *Pears v. Wilson* the only duty imposed on the executor was to pay over the money left by the will, here there are trusts to perform during the minority of the legatees. Suppose the trustee had distributed all the rest of the testator’s estate, and these sums, without any fault on his part, had become lost, could he compel the other parties to refund?—He was then stopped by the Court.

ALDERSON, B.—The rule must be absolute. It is no part of the ordinary duty of an executor to do what this trustee is required to do; for, inasmuch as the cestuis que trust are infants, he is to invest the money during their minority; and he has a discretionary power to apply the whole or any part towards their education or advancement. That is no part of the duty of an executor; and therefore this is the case of a real trust. In *Pears v. Wilson* the Court determined that a gift of money to an executor in trust to pay it over was not sufficient to deprive the county court of jurisdiction, but that there must be a real trust. That is the case here.

PLATT, B.—I entirely concur. The trustee is to distribute the assets and pay the legacies after payment of the debts, so far his duty would fall within the office of an executor. But it is not within the office of an executor to take upon himself to invest the property and hold it, with a discretionary power to apply it in the education of infants during their minority. This case is clearly distinguishable

(a) 2 E. & B. 573.

(b) 6 Exch. 833.

from *Pears v. Wilson*, for here the defendant had a trust to perform.

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BRAMWELL, B.—I am of the same opinion. The case of *Pears v. Wilson* has been disposed of by the observations which have been already made, and therefore I will only add a few words. The calling a person a trustee does not make him one, but it depends on whether he has a real trust to execute. In *Pears v. Wilson* the gift “upon trust to sell” was in truth nugatory, for the executor would have been bound to do so upon a simple bequest to the legatees. Therefore that was the mere case of a legacy, and we are not embarrassed by it. Then are not these complaints for the nonperformance of a trust? The plaintiffs’ cases are, that the defendant has received certain sums of money, which he was bound to invest during their minority, and pay over to them when they came of age; and that either he has not invested, or, having invested, has not paid the money to the plaintiffs now that they are of age. Is not that a plaint in respect of a breach of the defendant’s duty as trustee? If so, it is clearly not a case within the County Courts Act.

Rule absolute.

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WINTER v. BARTHOLOMEW.

A sheriff entered the house of A., and seized therein his goods, and also goods belonging to the execution debtor. A. brought an action of trespass against the sheriff, who thereupon obtained an interpleader summons, and the Judge ordered that the execution creditor be barred as to the goods of A., and that all further proceedings in the action be stayed:—*Held*, that the Judge had power under the Interpleader Act, 1 & 2 Will. 4, c. 53, s. 6, to stay the proceedings, and that the power was properly exercised, it not appearing that the sheriff had committed any excess.

THE plaintiff in this action having obtained a judgment against the defendant, a writ of fieri facias issued, directed to the sheriff of Warwick, under which he entered a dwelling-house which the defendant had formerly occupied, and levied on the goods therein. One Mister, who then occupied the house, claimed some of the goods under a purchase from the assignees of the defendant, who had become bankrupt, and he commenced an action of trespass against the sheriff for breaking and entering his house, and seizing his goods. The sheriff thereupon obtained an interpleader summons, which was heard before *Martin*, B., who made the following order:—

“Upon hearing &c., I do order that the claimant do furnish to the execution creditor a copy of the inventory of the goods claimed, and that as to such goods the execution creditor be barred. And I do further order, that the sheriff proceed to sell such goods (if any) of the defendant as are not included in such inventory, and hand over the proceeds thereof to the execution creditor. And I further order, that all further proceedings be stayed in the action brought by the claimant against the sheriff.”

An inventory was afterwards delivered in pursuance of the above order; and there were in the house goods of the defendant not included in the inventory, and which the sheriff removed and sold.

Field, on behalf of the claimant, in last Michaelmas Term, obtained a rule, calling on the sheriff and the plaintiff to shew cause why so much of the above order as stayed proceedings in the action against the sheriff should not be set aside; against which

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Lush now shewed cause.—The learned Judge had power to stay the proceedings. The authorities establish this rule, that, where the sheriff has wrongfully entered the house of a third person and seized his goods, the Court will not bar him of his action for the wrongful entry; but where the sheriff is justified in entering the house, the Court will stay proceedings, unless he has been guilty of some excess. That distinction was adverted to in *Tinkler v. Hilder* (a) by *Pollock*, C. B., who abstained, however, from expressing a decisive opinion on the point now raised. In *Abbott v. Richards* (b) and *Cater v. Chignell* (c), where the interpleader summons was decided in favour of the claimant, the Court allowed him to maintain an action for the breaking and entering his house; but in *Jessop v. Crawley* (d), where the interpleader summons was decided against the claimant, the Court stayed the proceedings in the action, it not being shewn that there was any cause of complaint beyond that of entering the premises to seize the goods. Here the sheriff was justified in entering the house of the claimant, for he found therein goods belonging to the execution debtor. It would be a good plea to the action, that goods of the execution debtor were in the house, and that the sheriff entered for the purpose of seizing them; therefore, if this action be allowed, the question which has been already determined must be again tried, viz. whether the goods belonged to the execution debtor.

The Court then called on

Field to support the rule.—The learned Judge had no power to stay the proceedings. The Interpleader Act (1 & 2 Will. 4, c. 58, s. 6) only applies to disputed claims to goods seized by the sheriff, and not where compensation

(a) 4 Exch. 187.

(b) 3 D. & L. 487.

(c) 15 Q. B. 217.

(d) 15 Q. B. 212.

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is sought for a trespass: *Hollier v. Laurie* (a). There *Maule, J.*, says, "It is true, power is given to the Court to make 'such rules and decisions as shall appear to be just, according to the circumstances of the case;' but that means according to the circumstances of the case *in which the Act confers the jurisdiction.*" *Jessop v. Crawley* (b) was decided on the County Courts Act (9 & 10 Vict. c. 95, s. 118). Under the 1 & 2 Will. 4, c. 58, s. 6, the Court has no power to adjudicate as to the right to the goods without the consent of the parties, but can only make an order for the adjustment of the claim by a jury. *Tinkler v. Hilder* is distinguishable, because there the execution debtor was the owner of the house in which the goods were seized, and consequently the breaking and entering the house was part of the same transaction as the seizure of the goods. This is the case of a trespass committed in the house of one party in order to seize the goods of another.

POLLOCK, C. B.—The rule must be discharged. The question, which arises upon the construction of the Interpleader Act (1 & 2 Will. 4, c. 58, s. 6) is, whether, when a sheriff has entered the house of a third party, and has seized therein some goods which he is justified in seizing, and others which he had no right to seize, but acting under a *bonâ fide* notion that he had such right, he can be altogether protected by an interpleader order; or whether the claimant can proceed for mere nominal damage in breaking and entering his house. I am of opinion that, upon the true construction of the Act, the Court or a Judge may stay the proceedings in such action. The object of the statute was to enable Courts of law to give relief against adverse claims; and the 1st section, which applies to defendants generally, authorises the Court to order the claimant to state the nature and particulars of his claim, and

(a) 3 C. B. 334.

(b) 15 Q. B. 212.

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"to make such *other rules and orders* therein as to costs and *all other matters* as may appear to be just and reasonable." There is no question about the power of the Court with respect to the class of cases provided for by that section. Those were cases in which Courts of equity continually stayed actions at law, and the intention of the Legislature was to give to Courts of law a power analogous to that of Courts of equity. At the same time it was well known that sheriffs were often placed in considerable difficulty; for where they were called upon to execute a writ they were liable to an action if they did not levy, and they were liable to an action if they seized the wrong goods. No doubt that difficulty was frequently made the means of harassing them and of creating costs. To remedy this acknowledged grievance, provision is made by the 6th section, which recites, that "difficulties sometimes arise in the execution of process against goods and chattels, &c., by reason of claims made to such goods, &c., whereby sheriffs and other officers are exposed to the hazard and expense of actions, and it is reasonable to afford relief and protection in such cases," &c. The statute then enables the Court to call the parties before them, "and thereupon to exercise, for the adjustment of such claims and the relief and protection of the sheriff or other officer, *all or any of the powers and authorities hereinbefore contained*, and make such rules and decisions *as shall appear to be just according to the circumstances of the case*." One of the powers thereinbefore contained is the power to stay proceedings in actions, and that is as much given by the 6th section as if it had said so in terms; and can anything be more just and reasonable than that a sheriff, who has entered a house for the purpose of executing a writ, and has bonâ fide seized some goods of the execution debtor, and also other goods which he has given up, and who has been guilty of no excess, should be protected against a harassing

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and expensive action. The cause of *Hollier v. Laurie* (a) is no authority the other way. In that case goods seized by the sheriff under a fi. fa. against A. out of *this Court* were claimed by B., to whom they were restored after an interpleader issue. B. brought an action of trespass against the sheriff for entering her house on the occasion of the seizure, and the Court of Common Pleas refused to stay the proceedings. There the learned Judge who made the interpleader order did not stay the proceedings; and the Court say, that, if the proceedings were a violation of the interpleader order, the application for relief should have been made to this Court, in which the interpleader took place. It is not denied that this Court had power to stay the proceedings; for if the Court of Common Pleas had solemnly decided that there was no such power, they never would have suggested that an application for that purpose might be made to this Court. Therefore that case is no authority to prevent us from staying the proceedings in an action against the sheriff where there is no real grievance beyond that of the seizure of the goods. For these reasons I think that the rule ought to be discharged.

ALDERSON, B.—I am of the same opinion. The object of the Interpleader Act is the adjustment of adverse claims; but there is incidentally a power to protect the sheriff when he is subject to an action, and it is unjust that he should be sued. If the sheriff has been guilty of misconduct, the Court will not protect him; but where he has done no wrong, the legislature intended that the Court or Judge who makes the interpleader order should protect him against vexatious actions. There is no injustice in so construing the Act, because the sheriff is liable to punishment where he has done wrong: it is not that he is to be exempt, but only that the Court is to exercise a discretion as to whether

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he is to be protected or punished. It is much more just that the matter should be left to the discretion of the Court or a Judge, than that the sheriff should be subject to vexatious actions; and that is certainly the meaning of the legislature and the true construction of the Act. The 1st section is founded on the original bill of interpleader, which was only entertained by the Court of Chancery and under particular circumstances, and it enables a Court of law to give relief where one person has brought against another an action, either of assumpsit, debt, detinue, or trover, and the subject matter of the suit is claimed by a third party. In that case it is clear that a Court of law has power to stay proceedings in the action. The 6th section, which provides for the case of a sheriff, enables the Court to exercise "all or any of the powers and authorities thereinbefore contained." It does not mention any form of action, because it was notorious that the remedy against the sheriff for wrongfully seizing and taking goods was by action of trespass, and that the breaking and entering a dwelling-house for that purpose was a mere aggravation of the trespass. The statute gives a power to adjust the claim and protect the sheriff by staying proceedings if an action has been brought, and if not, by prohibiting an action from being brought. In my opinion, that is the true construction of the Interpleader Act.

PLATT, B.—I am of the same opinion. The sheriff *bonâ fide* entered the claimant's house, and he was justified in entering, because some goods belonging to the execution debtor were in it. Therefore, the only question was, whether he had infringed upon the claimant's property. The Judge ordered that the execution creditor be barred as to the goods claimed, and that the rest be delivered up to the sheriff; and in order to prevent useless litigation, he stayed proceedings in an action which the claimant had brought against the sheriff for breaking and entering his house. It

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seems to me that the learned Judge had power to stay the proceedings. The 6th section authorised him to make such decision as should appear to be just according to the circumstances of the case ; and nothing can be more just than to prevent the sheriff from being harassed by an action in which no more than nominal damages could be recovered. If the sheriff broke the outer door, or in any other way misconducted himself, the Court would not stay the proceedings ; but where he has acted *bonâ fide*, it is monstrous to suppose that it was ever intended that he should be subject to an action.

MARTIN, B.—I am of the same opinion. I have constantly made orders of this kind. A sheriff enters the house of a third party and seizes goods therein. If the goods do not belong to the execution debtor, the sheriff is a trespasser; but if they do, then his entry is justified by the event. That is the common and ordinary case, and the universal mode of dealing with it is to make an order directing an issue to be tried, and prohibiting any action against the sheriff. This case differs in no way, except that some of the goods belonged to the claimant, and an action was commenced against the sheriff before he obtained the interpleader summons. Under those circumstances, I am clearly of opinion that the Act gives the power to stay the proceedings. The 1st section provides for the case of a person being sued who does not claim any interest in the subject-matter of the suit; and that is confined to actions of *assumpsit*, *debt*, *detinue*, and *trover*, so that under that section no question as to a trespass can arise. The 6th section, which relates to sheriffs, has a different object. It begins by reciting that “difficulties sometimes arise in the execution of process against goods and chattels, by reason of claims being set up by third persons, whereby sheriffs are exposed to the hazard and expense of actions” &c. Can there be a doubt that that applies to the case of a sheriff

being informed that goods of the execution debtor are in the house of a third person, whereupon he enters and seizes at his peril? The statute then authorises the Court, as well before as after any action brought against the sheriff, to call the parties before them and to exercise, for the adjustment of the claim and relief and protection of the sheriff, all or any of the powers thereinbefore contained, and to make such rules and decisions as shall appear to be just, according to the circumstances of the case. Here the sheriff entered a house, and seized goods which it was alleged belonged to the execution debtor, but which in fact belonged to another person; but it cannot be contended that the sheriff was liable to an action in respect of the entering of the house and not in respect of the seizing of the goods. The case of *Hollier v. Laurie* (a) seems to me to proceed on the fallacy, that there are two rights of action against the sheriff, one for entering the house, and another for seizing the goods; whereas, in truth, there is but one right of action in respect of the whole transaction, and as to that the Interpleader Act enables the Court to stay proceedings. Such has been the constant practice. If indeed the sheriff, in the execution of the writ, has committed any real grievance, the Court will allow the injured party to bring an action; but if he has done no real wrong, the Court will stay proceedings against him.

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Rule discharged.

(a) 3 C. B. 334.

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HERSCHFELD v. CLARKE.

An application for a discovery of documents under the 50th section of the Common Law Procedure Act, 1854, must be made upon the affidavit of a party to the cause.

Under the 51st section of that Act a party cannot interrogate as to the contents of written documents.

BLACKBURN moved for a rule, calling on the defendant to shew cause why he should not state what documents he has in his possession or power relating to the matters in dispute, and why the plaintiff should not be at liberty to inspect the same.

Issue had been joined in the action, which was brought to recover compensation for injury to the plaintiff's goods whilst on board the defendant's ship on a voyage from London to Constantinople; and the question was, whether the ship was seaworthy at the commencement of the voyage. The plaintiff resided at Constantinople, and therefore there was no affidavit by him in support of the application; but the affidavit of a third party stated "that, shortly after the vessel sailed from London, she put into Portsmouth in distress, and that afterwards the cargo was unloaded and the vessel repaired; that deponent believes that the defendant has in his possession or power a log-book kept during the voyage, surveys of the ship and cargo made at Portsmouth, bills for repairs, and letters from the captain of the vessel relating to the voyage and repairs; that deponent is advised and verily believes that the plaintiff will derive benefit from an inspection of the documents in the defendant's possession or power; and the discovery now sought for," &c. A similar application had been made to *Platt*, B., at Chambers, who refused it, on the ground that the 50th section (a)

(a) Sect. 50. "Upon the application of either party to any cause or other civil proceeding in any of the superior Courts, upon an affidavit by such party of his belief that any document, to the production of which he is entitled for the purpose of dis-

covery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the Court or Judge to order that the party against whom such application is made, or if such party is a body corporate, that some officer to be named of such body

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of the Common Law Procedure Act, 1854, requires the affidavit of the plaintiff himself. But if it is imperative that the affidavit be made by the plaintiff himself, the provision will in many cases be inoperative. It could never have been the intention of the legislature that a corporation, or a sick person, should be deprived of the benefit of that enactment. [*Alderson*, B.—The 50th section requires an affidavit of the party himself: it may be inconvenient, but such is the language of the Act; and can it be said that that construction leads to any absurdity?] The plaintiff then asks for leave to deliver interrogatories under the 51st section (b). [*C. Pollock* referred to *Scott v. Zygomala* (c). *Alderson*, B.—By the 51st section, the power to interrogate is placed on the same footing as the examination of witnesses; but it is confined to those matters as to which a

corporate shall answer on affidavit, stating what documents he or they has or have in his or their possession or power relating to the matters in dispute, or what he knows as to the custody they or any of them are in, and whether he or they objects or object (and, if so, on what grounds) to the production of such as are in his or their possession or power; and upon such affidavit being made, the Court or Judge may make such further order thereon as shall be just.”

(b) Sect. 51. “In all causes in any of the superior Courts, by order of the Court or a Judge, the plaintiff may, with the declaration, and the defendant may, with the plea, or either of them by leave of the Court or a Judge may, at any other time, deliver to the opposite party or his at-

torney (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter) interrogatories in writing upon any matter as to which discovery may be sought, and require such party, or in the case of a body corporate any of the officers of such body corporate, within ten days to answer the questions in writing by affidavit, to be sworn and filed in the ordinary way; and any party or officer omitting, without just cause, sufficiently to answer all questions as to which a discovery may be sought within the above time, or such extended time as the Court or a Judge shall allow, shall be deemed to have committed a contempt of the Court, and shall be liable to be proceeded against accordingly.”

(c) 4 E. & B. 483.

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discovery may be sought. The plaintiff could not ask a witness the contents of the documents in question, and therefore he cannot interrogate as to their contents.] The plaintiff may interrogate upon any matter as to which he might have a discovery in equity. *Scott v. Zygomala* only decided that where the plaintiff could proceed under the 50th section for an inspection of the documents that was the proper course, and not to apply under the 51st section. At all events, the plaintiff is entitled to an order for the inspection of the documents under the 14 & 15 Vict. c. 99, s. 6: *Hunt v. Hewit* (a). [Alderson, B.—In insurance cases it was the common practice for the Court under its general jurisdiction to order an inspection of documents.]

C. Pollock shewed cause in the first instance.—The application for a discovery under the 50th section must be founded on the affidavit of the plaintiff himself.—He was then stopped by the Court.

ALDERSON, B.—We (b) are all of opinion that an application under the 50th section must be made upon the affidavit of the plaintiff himself. But the rule may be absolute to deliver to the defendant interrogatories as to what documents he has in his possession or power, but not as to their contents; and if the defendant admit that he has certain documents, then the Court may, under the 14 & 15 Vict. c. 99, s. 6, or by its general jurisdiction, order an inspection of them.

Rule absolute accordingly.

(a) 7 Exch. 236. (b) *Alderson, B., Platt, B., and Bramwell, B.*

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BROWN v. OVERBURY.

Jan. 18.

ACTION for money had and received to the use of the plaintiff—Plea, never indebted.

At the trial, before *Coleridge, J.*, at the last Warwick Assizes, it appeared that, in the spring of 1855, certain persons had subscribed to a steeple chase, to be run in the neighbourhood of Henley, in Warwickshire. The defendant was treasurer of the race, and the plaintiff sought to recover from him 26*l.*, being the amount of the town stakes, which the plaintiff alleged were won by his horse, called "Minor." According to the articles, any dispute as to the race was to be decided by the award of four stewards. A dispute arose. The stewards met, but were unable to agree as to the winner, two being in favour of "Minor," and two in favour of another horse, called "Prince Albert."

It was submitted on the part of the defendant, that, under these circumstances, the action could not be maintained; and the learned Judge was of that opinion. The plaintiff's counsel then proposed to prove that the plaintiff's horse actually won, and that he was entitled to the stakes on the merits; and it was further contended, that, at all events, the plaintiff was entitled to recover back the amount of his contribution to the stakes. The learned Judge was of a different opinion, and nonsuited the plaintiff.

The defendant was stakeholder of a race, which was to be decided by the award of four stewards. After the race was over the stewards met, but were unable to agree, two being in favour of the plaintiff's horse, and two in favour of another horse. In an action by the plaintiff to recover the stakes—*Held*, that it was a condition precedent, that there should be a decision of the stewards, if practicable; and that the plaintiff could not submit the question to the jury, or recover back his amount of contribution.

C. J. Merewether, in last Michaelmas Term, obtained a rule nisi to set aside the nonsuit, and for a new trial; against which

Hayes now shewed cause.—First, the learned Judge was correct in refusing to try the plaintiff's right to the stakes on the merits. The rules of the race require that the event shall be determined by the award of the stewards, and there can be no valid decision unless they concur. If, indeed,

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the stewards are unable or incompetent to decide, then the question may be submitted to a jury: *Marryatt v. Broderick* (a); but in this case, for aught that appears, the stewards might again meet and come to an unanimous decision. The plaintiff had no right to submit the case to the jury unless he proved that the stewards were incompetent to entertain it.—Secondly, the plaintiff cannot recover back his contribution to the stakes. There has been no rescission of the contract, and therefore the defendant is justified in retaining the stakes until the winner has been declared. In *Marryatt v. Broderick* (a), Parke, B., says, "Even if the plaintiff had given notice in due time that he should require his stake to be returned, this being a legal horse-race, I have great doubts whether it would be recoverable, the agreement being, that it should be deposited to abide the event, which agreement cannot, as it seems to me, be varied without the assent of all parties."

Mellor in support of the rule.—The plaintiff had a right to have the question determined by the jury. The case is analogous to that of a reference to arbitration, which is no bar to an action in respect of the same matter; for an agreement which ousts the superior Courts of their jurisdiction is illegal and void: *Scott v. Avery* (b). The decision of the stewards is not a condition precedent to the winner's right to recover the stakes. *Marryatt v. Broderick* shews, that if the stewards are unable to agree, the matter must be determined by a jury. At all events the plaintiff is entitled to recover back his deposit. *Bate v. Cartwright* (c) decided that money deposited with a stakeholder, as a bet on the event of a foot race, may be recovered from him by either party, after the race has been run and the parties differ as to the winner.

ALDERSON, B.—The rule must be discharged. Every contract must be determined according to the circumstances

(a) 2 M. & W. 369.

(b) 8 Exch. 487.

(c) 7 Price, 540.

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belonging to it. This is one of racing, and the universal practice has been, that, in order to ascertain who is to have the stakes, it must first be determined who is the winner, not in the opinion of a jury, but of the persons appointed to decide it, viz. the judge or the stewards. If they have determined it, then the event has happened which entitles the winner to recover the stakes. In this case, the stewards have come to no decision, but it may be that they will when they meet again. If the plaintiff cannot get a decision from the stewards, and it becomes impossible finally to determine to whom the stakes belong, it may be that each party may recover back his contribution. The plaintiff, in the first instance, seeks to recover the stakes, because there has been a supposed decision in his favour; that, however, fails, and then he attempts to submit the case to a jury, or to get back his contribution because there has been no decision. That he cannot do, for he has not shewn that he is unable to get a decision from the stewards.

PLATT, B.—I am of the same opinion.

MARTIN, B.—The action was brought on a supposed decision of the stewards in favour of the plaintiff. If he had established that, the event would have happened which entitled him to recover. But he failed, for there had been no decision on the subject. He then offered to prove that he was entitled to the stakes because his horse won; but he cannot do so, for certain persons have been appointed by all parties to decide which horse was the winner. It could never be contended, that, in the event of a decision by the stewards, erroneous but without fraud, the question could be submitted to a jury. The judgment of the stewards in the case of a horse-race must necessarily be conclusive; they are expressly appointed to decide the matter, and there is no appeal from them. It is a condition precedent to the plaintiff's right to recover, that he obtain the judg-

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ment of the stewards, if practicable; and there is nothing to shew that it is not. The defect in the case is, that there has been no decision: it is like an action on a judgment of a Court below, when no judgment has, in fact, been pronounced.

Rule discharged.

Jan. 30.

BOVILL v. PIMM and RANDS.

In 1844, G. obtained a patent for "Improvements in grinding wheat and other grain." He described as his invention "the forcing and distributing of atmospheric air from the eye or centre of mill-stones,

for the purpose of cooling the grain during the process of grinding;" this was effected by an air-box placed below the mill-stones, into which air was forced by the rapid rotation of a fan or blower, which caused a current of air perpendicular to the axis of the fan; and the air was conducted by a pipe through the eye of the lower stone to the centre of the two stones, and there distributed between them by an apparatus provided with fans or arms. In 1846, the plaintiff obtained a patent for "Improvements in manufacturing wheat and other grain into meal and flour." His invention consisted of the application of ventilating vanes or screws at the centre of the stones for supplying the air between the grinding surfaces; a portable ventilating machine, blowing by a screw vane, which caused a current of air parallel to the axis of the vane, was attached externally to the eye of the upper mill-stone; the screw vane being set in rapid motion, the air was compelled to pass through the eye into the centre of the two stones, and so find its way out between them. In 1851, the defendant obtained a patent for "Improvements in grinding wheat," and his plan was to remove from the centre of both stones a large circular portion of each, and in this space, opposite to the separation of the two stones, to place a fan or blower, by the rapid rotation of which a centrifugal motion was given to the air, and it was driven between the stones:—*Held*, first, that the defendant's invention was no infringement of the plaintiff's, but that each was a new method of accomplishing a well-known object, viz. the cooling grinding substances by the common principle of obtaining a current of air by a rotating vane. Secondly, that the construction of the specification was a question of law for the Court, and not for the jury.

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within six calendar months next after the date of the letters patent, cause to be enrolled in the High Court of Chancery an instrument in writing under his hand and seal, particularly describing and ascertaining the nature of his said invention, and in what manner the same was to be performed. And the plaintiff did, within the time prescribed, fulfil the said condition. And the defendant, during the said time, did infringe the plaintiff's right.

Pleas—First, that her said Majesty did not, by the said letters patent, make such grant as alleged. Secondly, that the plaintiff was not the first and true inventor of the said supposed new manufacture, as alleged. Thirdly, that the said supposed invention was not a new manufacture. Fourthly, that the plaintiff did not, within six calendar months next after the date of the said letters patent, cause to be enrolled in the said Court of Chancery any instrument in writing under his hand and seal, particularly describing and ascertaining the nature of his said alleged invention, and in what manner the same is to be performed. Fifthly, not guilty.—Upon which issues were joined.

The particulars of breaches delivered with the declaration were as follows:—That the defendants, in or about July, 1853, and thence hitherto from time to time, have erected and used at their mill at Dockhead, in the county of Surrey, machinery for manufacturing wheat and other grain into meal and flour, having a ventilating vane or screw or similar apparatus fitted to the eye of the stone, as described in the specification of the letters patent in the declaration mentioned.

At the trial, before *Pollock*, C. B., at the London Sittings after Michaelmas Term, 1854, the following facts appeared:—Under the old process of grinding, a great deal of heat was generated, which caused the meal to choke up the stones, and thereby not only retarded the grinding but also injured the flour. To obviate this, it became a desideratum that air should be introduced between the stones, and many schemes were tried for that purpose. In the year 1843,

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one Concoran obtained a patent for producing this effect by openings cut in the upper millstone, which were filled with air by means of blades or radial vanes on the upper side for collecting the air as the stone rotated, and thus causing it to pass down these openings and between the grinding surfaces. This method, however, was not sufficiently successful to induce millers to adopt it. In April, 1844, one Gordon obtained a patent for "Improvements in grinding wheat and other grain, and in dressing flour and meal, which improvements in grinding are also applicable to grinding cements and other substances." The specification, which was enrolled the 30th of October, 1844, described the invention as follows:—

"The invention relates to the application of a current of atmospheric air for the purpose of cooling or reducing the temperature of the grain, flour, or meal, or other substances submitted to the operation of grinding or dressing; and the manner in which the same is to be performed and carried into effect will be seen by reference to the annexed drawings and the following description thereof:—

"Fig. 1 represents a sectional elevation of the gearing and arrangement of four pair of millstones for grinding wheat or other grain, together with the machinery for dressing the flour or meal, to which my improvements are applied; and Fig. 2 (a), is a plan of the four millstones, without the dressing apparatus. The remaining Figures are detached parts of the same apparatus, which will be hereafter referred to for the purpose of making the description of my improvements better understood. In Figs. 1 and 2, A represents the main upright shaft of the mill to which rotation is imparted by any adequate power. From the shaft A, motion is conveyed through the spur wheel B to the pinions B 2 on the spindles C, each of which carries one of the runners or upper millstones D, supported in the usual manner above the bed-stones E. In a horizontal

(a) The plans which accompany this case have been confined to such parts of the original plans as are necessary for comprehending the case.

FIG. 2.

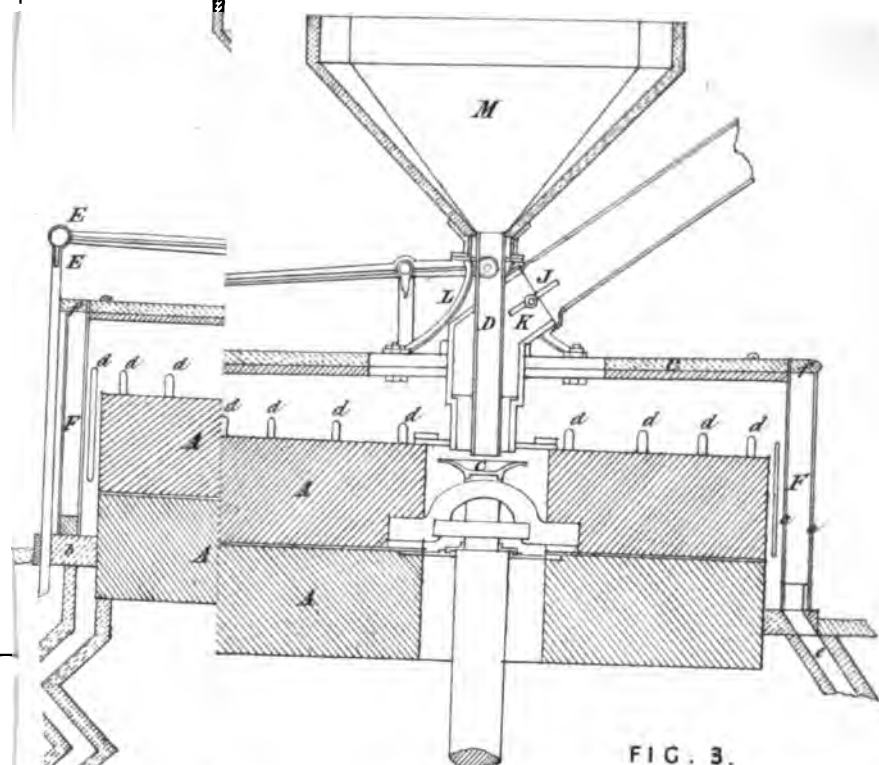
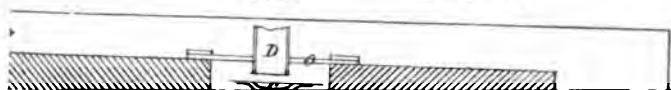


FIG. 3.



position and immediately below the stones E, is placed the air chest F, which is supplied with air by a rotary fan G, driven from any convenient movement of the mill gearing. From the air chest F, the pipes *f*, proceed through the eye of each of the bed-stones E, into a casting *e*, which surrounds the spindle C. These castings *e* constitute the bush in which the spindles revolve, and are constructed in two separate forms, the one as represented on an enlarged scale in section and elevation at Figs. 3 and 5, and in plan and sections at Figs. 9 and 11, and the other as represented in section and elevation at Figs. 4 and 6, and in plan and section at Figs. 10 and 12. In the former of these arrangements the pipe *f* passes direct to the space between the two millstones D and E; in the latter the pipe *f* passes into a circular chamber *g*, and from which the air is allowed to escape to the space between the stones by a series of openings, as seen in the plan, Fig. 10. Attached to the spindles C, and above the casting, is placed the circular flange or distributor H, provided with fans or arms, the forms of which are seen at *i*, in plan at Figs. 7, 8, 15, and 16. Supposing, therefore, the mill to be in operation, a constant supply of atmospheric air will be forced by the fan G into the air chest F, and thence conducted by the pipes *f* to the space between the parts *e* and the revolving flange or distributor H, which spreads or distributes the air between the stones D and E, and among the grain or other substances submitted to the operation of grinding, the amount of air being regulated and governed by the respective stop-cocks *h* on the pipes *f*.

"In the first arrangement of this part of my improvements, or that in which air is admitted direct between the parts *e* and H, such parts are shewn in section and separate at Figs. 3, 5, 7, 9, 11, 13, and 15; and in the second arrangement, or that in which the air is first admitted into the circular chamber *g*, as already described, such parts are shewn in section and separate at Figs. 4, 6, 8, 10, 12, 14, and 16; and in both arrangements I have found the grind-

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ing operation improved by varying the work on the face of the grinding stone from that represented at Fig. 17 (which is the ordinary form of the work), to that represented at Fig. 18, which I find to answer better when air is forced during the grinding process; but I do not claim any exclusive right in respect of such variation in the work or face of the grinding stone, except in connection with the current of air herein referred to. In applying my improvements to the grinding of cement and other substances, it may be found convenient to adopt slight variations in the arrangement above described, which I have given as the best arrangement with which I am acquainted for attaining the object of my invention, and which I believe will be sufficient to enable any competent person acquainted with grinding machinery to apply this part of my improvements to the grinding of any substance which it may be desirable to subject to a current of air.—(The specification then described such part of the invention as related to the dressing of flour or meal).

“The advantages derived from the application of my invention are: first, the cooling and keeping down the temperature of the grain or other substance submitted to the grinding operation; and, second, the more completely cooling of the flour or meal during the dressing process. In grinding wheat, particularly, I consider the advantages of the greatest importance, as I have found the power required for driving the stones is much decreased, and the produce of the flour and meal or other substance greatly increased, while the colour of the flour or meal is improved by the low temperature at which the grinding proceeds. It is well known to millers and persons experienced in grinding, that the millstones often get so hot as to clam up from the glutinous nature of the flour or meal, which not only spoils the flour or meal, but compels the miller to diminish the feed, while the power required is greatly increased; but these difficulties are entirely obviated by the application of my improvements.

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"Having now described the nature of my invention, and the manner in which the same is to be performed and carried into effect, as applied to one arrangement of grinding and dressing machinery, I hereby declare that I do not claim as of my invention, or the exclusive use of the separate parts of such machinery, or the arrangements of such parts, except when such parts and arrangements are employed for the purpose of and in connection with the introduction of a current of air to reduce the temperature of the substance which is undergoing the operation of grinding or dressing; but what I do claim as my invention is the forcing and distributing of atmospheric air from the eye or centre of mill-stones for the purpose of cooling or keeping down the temperature of the grain and other substances during the process of grinding; and I also claim the forcing and distributing of atmospheric air into and through machinery for dressing flour as herein described."

On the 11th of February, 1846, one Newton obtained a patent for "Certain improvements to be applied to the grinding of grain and other substances;" and the specification was enrolled on the 11th of August in the same year. This method consisted in enclosing the stones in an air-tight case, and by means of air pumps or fans exhausting the air from the peripheries of the stones, and thus producing a current of air between the grinding surfaces, which obtained entrance at the eye of the running stone.

On the 18th of August, 1846, the plaintiff obtained his patent for "Improvements in manufacturing wheat and other grain into meal and flour." The description in the specification, which was enrolled on the 18th of February, 1847, is as follows:—

"The first part of the invention consists of closing the eye of the running stone, by which currents of air above the pressure of the atmosphere may be introduced or forced between the stones, and in such a manner that the meal is

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delivered from between them in a cool state, and the operation of grinding is carried on in a more rapid manner.

"Secondly, in the application of ventilating vanes or screws at the centre of the stones, for supplying the air between the grinding surfaces.

"Thirdly, in the application of blades to the peripheries of running stones for producing by a fan action the necessary current between the grinding surfaces.

"Fourthly, the invention consists of the application of double stone hoops or cases for condensing and separating the dust or stive from the air and avoiding the waste of meal.

"Figure 1 represents a transverse section of a pair of millstones fitted according to one arrangement of the first part of the invention, in which A, A, are the stones as usually employed; B, driving spindle, on the cross bar of which the cup C is attached to receive the grain from the feed pipe D, which is regulated in the ordinary manner with the lever and regulating rod E, E; F, the double stone case or hoop, the top of which is closed by the cast-iron plate G, fastened by bolts and nuts; attached to this plate is the nozzle H, furnished with a throttle valve J, for regulating the supply of air to the stones from the air pipe K, through which the air is blown from an ordinary fan or other blowing machine; L, cast iron hollow column with open bars or flutes, between which the studs of the feeding lever are screwed to the feed pipe D, which works through the column into the feeding hopper M, which stands on the top of the column; N is a cast iron grooved ring attached to the top of the running stone around the eye; O, a circular leather inserted into the groove of the cast iron ring, and secured to the stone case F, the object of which is to prevent the current of air or any grain passing otherwise than through between the grinding surfaces. It will be obvious when the stones are set to work, and a blast of air introduced from a blowing machine through the pipe K,

that there will be a considerable current of air between the stones from the centre outwards in every direction; and by the eye of the stone being closed up by the leather ring O and plate G, the necessary pressure of the blast from the fan or other blowing machine is sustained, the blast of air not being able to get away through the eye of the stone: hence the blast will be equal to deliver in its passage from the centre of the stones outwards in every direction the meal or flour from the stones in a cool state, as it is produced from the grain. The stones are cooled, and being thus kept free from meal, their entire working surfaces are constantly in action on the grain, the stones thus performing a very considerably increased duty without a corresponding increase of power. I would here remark, that I am aware that air has before been introduced between the surfaces of millstones in various ways, but without closing the eye or centre of the runner, and therefore the supply of air passing between the stones has not been maintained above the pressure of the atmosphere; and such modes so heretofore practised have consisted of openings in the runner to create a circulation of air between the surfaces when working; also by the introduction of a blast of air through a pipe placed near the centre of the bed stone, such pipe being surmounted with a distributing plate attached to the driving spindle for dispersing the air between the surfaces; but from the necessity of the distributing plate being of much smaller diameter than the eye of the running stone to allow the feed of grain between the stones and the circumference of the distributing plate, the greater portion of the air blown into the eye passed up through the eye of the runner without effecting its object. And it has also been proposed to withdraw the air from the case containing the stones, with a view to inducing air to pass down the eye of the runner and through between the stones. I would, therefore, have it understood, I do not claim as the invention the

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principle of causing air to pass between the grinding surfaces of millstones.

"Figure 2 is a transverse section, shewing another arrangement of this part of the invention. The same letters refer to the same parts that are similar to Figure 1. The eye of the running stone is closed with the leather O, secured to the top of the stone; this leather has a circular opening, into which the blast pipe K is fitted. There is a throttle valve J for regulating the supply of air as in Figure 1, and the feed tube D works through the air pipe into the feeding hopper M, which is supported by the bracket L. When the stones are working, the leather O attached to the runner works freely round the air pipe K, the lower end of which is furnished with a telescope joint to facilitate its being withdrawn to clear any dust from the feed cup or eye of the stone, without stopping. By this arrangement of closing the eye of the running stone, the pressure of wind blown from the fan is sustained, as before described.

"Figure 3 represents another method of effecting the same purpose, the feed tube D being in this instance inserted into a circular opening to fit it in the leather covering O, and the blast of air from the air pipe K, introduced through an open cast iron bush P, around the spindle B; the top of this open bush being covered with a perforated plate Q, prevents the grain entering or choking the air pipe. R is a box or nozzle attached to the under side of the bush, having a throttle valve as before, for regulating the supply of air. The bottom of the box R has a circular opening for the stone spindle to work through, but is to be so fitted as to prevent the escape of air.

"Figure 4 represents a transverse section of a pair of millstones, fitted according to the second part of the invention. A, A, millstones; B, driving spindle; C, feeding shoe of the ordinary construction supplied from the hopper M; D, shaker or damsel for feeding shoe; and E, line for regulating feed in the ordinary way. F, double stone case

for preventing dust, as hereafter described; G, a portable ventilating blowing machine, fitted to the eye of the running stone. This ventilator is furnished with blades or arms attached to a spindle, upon the top of which a small rigger H is fixed, for driving it at considerable velocity. The damsel D is constructed with a bush to carry the spindle of the ventilator. J, driving pulley on stone spindle from which the gut band K passes over the small wheels L, L, round the small rigger of the ventilator. When the stones are set to work, this ventilator revolves at considerable velocity, blowing and sustaining a sharp blast of air down the centre of the runner, the blades performing the duty of supplying the necessary blast for discharging the meal from between the grinding surfaces instantly on its production. The grain passes freely down through the ventilator to the stones. The blades shewn in the drawing may be varied or a screw substituted for them, the driving motion may also be altered at pleasure, and the ventilator might be placed in the bed stone instead of the runner; but I would remark that I have found three blades, as shewn on the ventilator spindle, and the arrangement for driving the same, the most convenient" (a).

"Having thus described the nature of the invention and the manner in which the same is to be performed, I would have it understood that I do not confine myself to the precise details herein mentioned, so long as the peculiar character of either part of the invention be retained. But what I claim is—

"First, the closing of the eye of the running stone, and combining therewith a blast of air above the pressure of the atmosphere at or near the centres of millstones, so that the pressure of air is sustained to carry out the meal from between the grinding surfaces as produced.

"Secondly, I claim the application of ventilating screws

(a) Then followed a description of the third and fourth parts of the invention; but as no ques-

tion was raised as to those parts, the description is omitted.

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or vanes for blowing and sustaining the necessary blast of air between the grinding surfaces of millstones, as herein described.

"Thirdly, I claim the application of what I term fan blades to the periphery of the running stone for producing currents of air between the grinding surfaces of millstones, the passage over the back of the stones being closed, as described in respect to Figure 5.

"And, fourthly, I claim the application of double hoops or cases to millstones for separating and condensing the dust or stive from the atmosphere, and avoiding the waste of meal, as herein described."

In December, 1851, the defendant Rands obtained a patent for "Improvements in grinding wheat and other grain." The description in the specification, which was enrolled on the 18th June, 1852, is as follows:

"This invention consists of improvements in constructing, suspending, and ventilating millstones. — Figure 1 shews so much of a vertical section of two millstones as will enable me to point out the construction and mode of ventilating the same; Figure 2 shews a plan of the lower stone; and Figure 3 shews a plan, partly in section, of the stones and apparatus combined therewith. It will be seen that the millstones have large openings in them, which is advantageous by reason of removing that part of the stone which has the slower surface speed, and admits of a fan or blower being worked within the opening independently of the millstones. The upper stone is suspended on axes *a, a*, in a frame *b, b*, and the frame *b, b*, which surrounds the stone *A*, is suspended or moves on axes *c, c*, by which, like the hanging of a mariner's compass, the stone is free to vibrate, and thus adjust its position at all times so as to work correctly with the stone. The under stone *B*, which is the one I prefer to drive, is similarly hung, but in the interior in place of the exterior; thus the frame or plate *d*, on which the stone is affixed, receives the axes *e, e*, of the frame *f*, and the frame *f* receives the axis *g* of the boss *h*

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to which the axis *i* is affixed, as is shewn; and it is by this means that motion is obtained to the under stone, and that stone has at the same time free power to swing or move in all directions in order to accommodate itself, and so as at all times to vibrate with and retain its surface correctly with the surface of the upper stone *A*. *j* is a fan or blower on the axis *k*, which receives motion by a band from the axis *l*, which receives its motion by a band from the axis *i*, and it is by these means of hanging the two stones that they mutually adjust themselves to the action of each other, and are enabled to work correctly together. The stones are surrounded by a case or hoop *m*. The corn is fed from the hopper, and falls through the shoot *n*, and it is projected with the air towards the opening between the mill stones. *o* is a plate fixed in the opening in the lower stone, above which the fan or blower works. *p* is an inclined plate fixed within the opening in the upper millstone, so that the air will be guided to the opening between the millstones as the air is thrown off by the vanes of the fan or blower. The blower is formed with six vanes, but that number as well as the form of them may be varied, so long as there is an opening made in the stone large enough to receive a fan or blower within it, and capable of free action within such opening. By this mode of constructing, suspending, and ventilating millstones, there is a considerable saving of power, and the extent of grinding surface is reduced; and when in use I prefer to have the corn crushed before being fed to the stones."

The only evidence of infringement was, that the defendants had erected and used at their mill at Dockhead, in Surrey, the machinery described in Rands' specification. Numerous scientific witnesses were examined, but their testimony was conflicting as to whether Rands' invention substantially differed from the plaintiff's.

It was objected on the part of the defendants, first, that the invention was not new; secondly, that the specification

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was bad, inasmuch as it claimed things not new, and did not distinguish new from old, nor sufficiently describe the velocity at which the ventilator ought to be driven. The learned Judge reserved the points, and left it to the jury to say whether Rands' invention was included in the plaintiff's, or was substantially different, at the same time expressing an opinion that the question was for the Court on the construction of the specifications. The jury found a verdict for the plaintiff; and by the direction of the learned Judge, the verdict was entered for the plaintiff on all the issues except on "not guilty," and on that for the defendants; and leave was reserved to the plaintiff to enter the verdict for him on that issue, if the Court should be of opinion that the question of infringement was for the jury, or that, if it was for the Judge, he ought to have directed the verdict to be entered for the plaintiff.

Sir *F. Thesiger* in the following Term (Jan. 13) obtained a rule nisi to enter the verdict for the plaintiff on the points reserved; and in Trinity Term (*a*), (June 8), *Knowles* obtained a rule to enter the verdict for the defendants on the second, third, and fourth issues, on the ground of the above-mentioned objections, or for a new trial, on the ground that the verdict was against evidence.

Knowles and *Hindmarch* shewed cause against the rule to enter the verdict for the plaintiff on the plea of "not guilty" (*b*).—It was the province of the Judge to decide the question of infringement, the whole of the evidence being matter in writing; and he has properly directed a verdict for the defendants on the last issue. In *Neilson v. Harford* (*c*), *Parke*, B., in delivering the judgment of the Court, says: "The construction of all written instru-

(*a*) *Knowles* was prepared to move in Hilary Term; but, at the suggestion of the Court, his motion stood over.

(*b*) May 3 and June 8, 1855.

(*c*) 8 M. & W. 806.

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ments belongs to the Court alone, whose duty it is to construe all such instruments, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the Court, either absolutely, if there be no words to be construed as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them." *Barber v. Grace* (a), *Tetley v. Easton* (b), *Newton v. Vaucher* (c), and *Bush v. Fox* (d), are also authorities that the construction of a specification is for the Court and not for the jury. If the defendants' patent is an infringement of the plaintiff's, the plaintiff's is an infringement of Gordon's. Gordon used a rotary fan or blower for the purpose of creating a current of air, which was conducted to the centre of the stones, and dispersed between the grinding surfaces by means of a revolving flange or distributor. In Gordon's invention, the air is introduced at the eye of the lower stone, and a similar method is described by the plaintiff in his specification Fig. 3. The use of a fan or blower is common both to the plaintiff's and Gordon's invention, but the defendants' fan resembles Gordon's, not the plaintiff's. If Gordon had placed his fan in the upper instead of the lower stone, that would have been the same as the plaintiff's method. The defendant's invention is a new and improved method of applying well-known principles for the accomplishment of a particular object, and is, therefore, no infringement of the plaintiff's invention: *Barber v. Grace* (e). In the defendant's invention, the ventilator is placed at the top of the lower stone, which revolves instead of the upper, and the centrifugal force produced by the flat vanes creates a current of air

(a) 1 Exch. 339.

(d) 9 Exch. 651.

(b) 2 E. & B. 956.

(e) 1 Exch. 339.

(c) 6 Exch. 859.

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perpendicular to the axis of the fan, and not parallel to it, as is caused by the upper screw vanes of the plaintiff's ventilator, which act in the same way as a screw-propeller. A workman, by reading the plaintiff's specification, would not be enabled to construct the defendant's machine. The defendant's invention in no way interferes with the first part of the plaintiff's claim, which consists of closing the eye of the running stone. It is said, however, that the ventilating vane or screw, by driving the air inwards, in effect closes the eye of the stone; but the first and second parts of the claim are totally distinct.—[They then argued that the invention was not new; that the claim extended not merely to the combination of the whole, but to all the elements of the invention, citing *Holmes v. London and North Western Railway Company* (a), *Tetley v. Easton* (b); also that the plaintiff's specification was bad, inasmuch as it would be necessary to make experiments to ascertain the velocity at which the ventilator ought to be driven: *Hindmarch on Patents*, 177; *Morgan v. Seaward* (c); *Crompton v. Ibbotson* (d). The Court then granted the defendants the above-mentioned rule (e).]

Sir *F. Thesiger*, *Bovill*, and *Webster* supported the rule to enter the verdict for the plaintiff on the last issue, and shewed cause against the rule to enter the verdict for the defendants on the second, third, and fourth pleas, or for a new trial (f).—First, the question of infringement was for the jury, and they have decided it in favour of the plaintiff. What the invention is depends on the terms of the specification; and when any prior book or specification has described and published the invention, the written instrument itself destroys the validity of the subsequent patent, without any

(a) *Macrory Pat. Cas.* 13.

(b) 2 E. & B. 956.

(c) 1 *Webs. Pat. Cas.* 170.

(d) *Dan. & Lloyd*, 33.

(e) See ante, p. 730, note.

(f) June 8 and 23, 1855, and January 23, 1856.

proof of user; but the question whether the invention has been infringed depends upon the *act done*, of which Rands' specification was only part of the evidence on which the jury must determine: *Stead v. Anderson* (a). The Judge may receive information from scientific witnesses as to the meaning of certain expressions in the specification, and then put a construction upon them; but whether in point of fact the invention has been infringed, is a question for the jury. [*Martin, B.*—The question whether the defendant has done a certain act is for the jury; but when they have found that the act has been done, it is for the Judge to determine whether the act amounts to an infringement.] Assuming that it was a question for the Judge, he came to a wrong conclusion. All the inventions prior to the plaintiff's failed to accomplish their object. The plaintiff first discovered, that, in order to force the air between the stones, it must be under pressure. That is done by closing the eye of the running stone, and also by forcing the air inwards by means of a ventilating vane or screw, which, in effect, closes the eye of the stone. The defendant does the same thing and by similar means. There is no substantial difference between his vane and the plaintiff's.—They referred to *Jupe v. Pratt* (b), *Muntz v. Foster* (c), *Stevens v. Keating* (d).

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The Court suggested that the arguments on the other points should stand over until after their decision on the question of infringement.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was an action for the infringement of a patent, bearing date the 18th of August, 1846. The title of the patent was "Improvements in manufacturing wheat and other grain into meal and flour." The declara-

(a) 4 C. B. 806.

(b) 1 Webs. Pat. Cas. 145.

(c) 2 Webs. Pat. Cas. 96.

(d) 2 Webs. Pat. Cas. 181.

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tion was in the usual form. There were five pleas: First, that the Crown did not by the letters patent make the alleged grant: Secondly, that the plaintiff was not the first and true inventor of the supposed new manufacture as alleged: Thirdly, that the said invention was not a new manufacture: Fourthly, that the specification did not properly describe the invention: Fifthly, not guilty.—The replication joined issue on all these pleas.

The particular of breaches was, "that the defendants had erected and used at their mill *machinery* for manufacturing wheat and other grain into meal and flour, *having a ventilating vane or screw, or similar apparatus fitted to the eye of the stone as described in the plaintiff's specification.*"

At the trial, various patents were alluded to, and some given in evidence, with their specifications. Corcoran's (in 1843) was mentioned and described by a witness. The patent and specification of Robert Gordon were given in evidence, the patent dated the 30th of April, 1844, the specification enrolled 30th of October the same year. Also Alfred V. Newton's patent and specification, the patent dated 11th of February, 1846, the specification enrolled 11th of August in same year. The plaintiff's patent dated the 18th of August, 1846, and the specification enrolled the 18th of February, 1847; and lastly, the patent of the defendant (Christopher Rands) dated the 19th of December, 1851, with the specification enrolled the 19th of June, 1852, were given in evidence and read. The only evidence of infringement was, that the defendants had erected and used the machinery described in the defendant's Christopher Rands' specification.

The real question between the parties, therefore, was as to the extent of the *plaintiff's right* under his *patent and specification*, and whether it included the invention or method of the defendant Rands: if it did, then the defendants had infringed the plaintiff's patent; if it did not, then the defendants had not been guilty of any infringement.

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At the trial there was opposing evidence on each side as to the opinion of eminent engineers and mechanics on the subject of the two methods. I thought that the meaning and effect of the written instrument, the plaintiff's specification, was for the Court; but I took the opinion of the jury, as if it had been a mere question of fact. The jury found for the plaintiff; but I directed them, as a matter of law, to find for the defendants, which accordingly they did, and I reserved the point for the opinion of the Court, reserving also all other points that had been made at the trial. In the beginning of Hilary Term last year, a motion was made by Sir *F. Thesiger* to enter the verdict on the plea of not guilty for the plaintiff, and a motion was afterwards made by Mr. *Knowles*, for the defendants, for a new trial if the verdict was to stand, on the ground that the finding of the jury was wrong. He also moved to enter the verdict for the defendants on some other issues. The arguments on these rules were concluded in this Term on Tuesday, the 22nd of January, and we have now to dispose of them.

The first and principal inquiry is, what (with reference to the antecedent patents) was the extent of the plaintiff's, Bovill's, right under his patent and specification. To ascertain this, it is necessary to advert to the patents and specifications themselves. It is not necessary to allude to Corcoran's patent at all, which in fact was not given in evidence. Gordon's patent was for "Improvements in grinding wheat and other grain," &c.; it was dated the 30th of April, 1844. The specification consisted of a drawing and a description of the drawing, with a very short disclaimer and a very distinct claim *as his invention*, (namely,) "*the forcing and distributing of atmospheric air from the eye or centre of millstones for the purpose of cooling the grain during the process of grinding;*" and there can be no doubt that the method adopted in order to force the air was by causing a fan or vane to rotate rapidly, and thereby

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produce a current of air. It is perhaps not very easy to describe in mere words, and without reference to the drawing, all that the specification contains, but enough may be stated for the purposes of our judgment; (of which, in the event of an appeal, copies of the patent, specifications, and drawings here alluded to must be considered a part, to make our judgment intelligible); and it is sufficient to say that there is an air box below the millstones into which air is forced by the rotation of a fan similar to what is now frequently used in manufactories instead of bellows, similar also to the domestic implement called a *blower*, used instead of a common pair of bellows to an ordinary fire. The air thus forced into the box has, of course, a pressure above that of the atmosphere when not in motion, and it is conducted by a pipe to the eye of the bed-stone (or lower-stone), and through the eye to the centre of the two millstones; and then there is an apparatus for distributing it from the centre of the two stones between them. This is done, or attempted to be done, by what is called the "Distributor," provided with "fans or arms." There is therefore, in this invention, the use of a *fan* to produce a current of air, and this fan is *not* the fan described in the plaintiff's specification, but *is* the fan used by the defendant and described in his specification (that is, the current of air is *perpendicular to the axis of the fan*, and not paralalled to it as in the plaintiff's method), and the air is introduced at the eye of the *lower stone*, and it is proposed to distribute it from the eye to the centre, and thence between the stones.

After this patent of Gordon's, no one could claim exclusively, in relation to this subject, the use of a fan, (and certainly not of the fan used by Gordon creating currents of air perpendicular to the axis of the fan in motion,) or the introduction of a current of air (above the pressure of the atmosphere) at the eye of the millstone *by means of such a fan*. It is not necessary in detail to notice Newton's patent:

it proposed, not to force air through the eye of the mill-stone and so between the stones, but to create a vacuum about and surrounding the stones, but not including the eye, and so drawing the air through the eye and between the stones. He proposes to use air pumps to suck out the air, or *fans* to create a partial vacuum by forcing it out. In the course of the argument this apparatus has been referred to as "an exhaust" or the "exhausting process?"

The next patent is that of the plaintiff's, the specification of which, like the others, consists chiefly in a drawing with explanations. He divides his invention into four parts. The first part consists of closing the eye of the running stone (the upper-stone), and this is explained in fig. 1; a cast iron plate is fastened by bolts and nuts, and through this air is forced into the centre of the stones. It cannot be argued (we think) with any success, that the defendant's specification interferes at all with this first part of the plaintiff's invention. The second part of the invention is the "application of *ventilating vanes* or *screws* at the centre of the stones for supplying the air between the grinding surfaces," and all the important questions in the cause arise upon this second part of the invention. It was not argued (nor could it be) that the third and fourth parts of the invention had in any way been infringed, but an attempt was made to shew that the first part had been infringed. It was argued by the plaintiff's counsel that the first part of the plaintiff's invention was performed by the second, and that the *ventilating screw*, by driving the *air* in one direction, viz. inwards, and thereby preventing it from escaping, was in fact a "*closing of the eye*." We think it is really an abuse of language to call what is done in the second part of the invention "a closing of the eye," because the air is compelled to go in one direction only, and the eye is left open on purpose that air may be supplied and be compelled to go *in that* direction; but the claim to close the eye in the plaintiff's specification must be understood to mean

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actually, physically, and in the manner described in the drawing, which was mechanically by the cast iron plate G, fig. 1., or by the leather O, fig. 2; and if it be said the first claim in the plaintiff's specification as to "closing the eye" does not refer to the drawing, and may therefore include closing the eye (if in any sense that can be called closing) the answer is, that Gordon had done that before: his current of air as much closed the eye as Bovill's, and the patent would therefore be void, for claiming an invention already published by another.

The question then remains, is the invention of the defendant Rands within the second part of the patent and specification of the plaintiff. The general description of the second part of the plaintiff's patent has already been stated, the *particular* description by reference to the figure 4 is very intelligible. A portable ventilating machine G, fig. 4, blowing by a screw vane, which compels the air to move in one direction only, is attached externally to the eye of the upper millstone. The screw vane being set in rapid motion, the air is compelled to pass through the eye into the centre of the two stones, and so find its way out between them, so as to effect the object of the patent. It is said that the ventilator might be placed in the lower stone instead of the upper stone (the bed-stone instead of the runner), and the claim is (as it ought to be in such a case) limited to *the method therein described*. In Bovill's specification there is a distinct allusion to Newton's specification, but there is no allusion whatever to Gordon's.

Rands' patent, which it is contended by the plaintiff's counsel is included in Bovill's, is for "*improvements in grinding wheat, &c.*," and his plan (as appears from the drawing and description) is to remove from the centre of both the stones a large circular portion of each, so as to form a circular chamber (as it may be called) in the centre of the grinding apparatus (that is of the two stones), and in this chamber or space, opposite to the separation of the two

stones, he places, not a screw vane, but a *blower* similar to Gordon's, the rapid rotation of which gives to the air a centrifugal motion and makes it impinge directly upon the space between the stones, so as to cool the substance which is undergoing the process of grinding; and the question is whether *this* method of cooling is included in Bovill's patent: and we are of opinion that it is not; and we think it is for the interest of the plaintiff that it should not be within his patent and claim, for if it were, we think the patent would be void as being included in Gordon's patent.

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It appears to us, that, where a subject is not new, as this certainly was not, viz. "*the cooling of substances undergoing the process of grinding*," (which had been long known to be a desideratum in grinding, and to effect which various contrivances had been adopted, and several, if not many, patents taken out), any patent taken out for a method of performing the operation is substantially confined to that method, and cannot be extended to other methods obviously different, because they involve some common principle applied to the common object, and may apparently be described by the same general phrase. In this case the common object was known, viz. cooling the grinding surfaces or the substances exposed to their action. The principle of obtaining a current of air by a rotating vane (if that can be called a *principle*) was already made known to the world by Gordon's patent. Bovill's method was an improvement on Gordon's, it was not so called by the inventor (who for anything that appears in the specification was not aware of Gordon's, though quite aware of Newton's); but, in reality, Bovill's was a much better method than Gordon's; Rands' is also, probably, a better method than Gordon's, and may be a worse method than Bovill's; but the question is, is it the same, or substantially the same, mechanical method of carrying the principle into effect or accomplishing the object desired? We think it is quite different and much nearer to Gordon's than to Bovill's, though different from

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both. The plaintiff's counsel apparently thought, and certainly argued, that if two methods could be described in the same general words, they must be the same, or that it was a question of fact for skilful mechanics to decide whether they were or no. Bovill's invention can be described (no doubt) in terms so vague and general as to include Rands' method, but then also it would include Gordon's, whose patent was taken out some years before, and Gordon would not be allowed to use or improve his own discovery. If Bovill can claim the use of a vane in the very centre of the apparatus instead of outside of it, according to his description, and if a vane different from that which he has indicated in his drawing and specification, a fortiori, Gordon might claim the introduction of his *own vane into the centre*. But we think the patents as they appear before us are respectively independent original improvements; and that each is entitled to protection in respect of the method disclosed in it, but cannot claim beyond what is substantially the method actually described and given to the public.

We think the claim of the plaintiff in the action is to be considered as founded on the true construction of his patent and specification, and is not to be measured by the actual claim put forward and attempted to be supported by evidence at the trial; otherwise, we should be disposed to say, that the Queen did not grant that which the plaintiff claims, and that in *part* it is not new; and so the defendants would be entitled to our judgment on the first and third pleas. But we think the claim of invention in the action must be considered as the claim which the plaintiff is legally entitled to make; and then the question between the parties in the cause arises on the fifth plea of not guilty, which also raises the question as to the extent of the Queen's grant to the plaintiff, and to what extent that goes and how much it embraces, in other words, what is *the true meaning and construction of the specification*. We think this is a question of law where the facts are not disputed; and if, instead of proving the infringement by proving the plain-

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tiff's patent, and taking an admission, or giving evidence, that the defendants had worked under Rands' patent, the plaintiff had given evidence of the actual machinery erected by the defendants, the question would still have recurred, what is the true construction of the plaintiff's specification, and does it include what the defendants have done? We think this would have been a question of law for the Court; and that it is clear, on the true construction of the plaintiff's specification, that it does not include what it is alleged the defendants have done; and we think this so clear, that we should undoubtedly have granted a new trial, if the only question before us had been whether the verdict was against the evidence or not. We, however, think that the plaintiff's rule to enter the verdict for him should be discharged, and that the verdict for the defendants should stand.

It is open to the plaintiff to have this decision reviewed; and it is at least doubtful whether the Court of Appeal can do more than dispose of the point reserved (viz. whether the verdict should be entered for the plaintiff or not): but this Court could adopt an alternative, and direct a new trial; and as the defendants' counsel has obtained a rule nisi for a new trial, and to enter a verdict for the defendants on the other issues, we not only can entertain the question, but are bound to do so; and if the question at the trial was one of fact and not of law, we think the jury came to a wrong conclusion, and that there ought to be a new trial. The defendants' rule, as far as relates to a new trial, will therefore be suspended, and the residue of it will be discharged. If the verdict for the defendants on the fifth plea shall be sustained, so much of the rule as relates to a new trial will be also discharged; if the verdict be entered for the plaintiff by the Court of appeal, then the rule for a new trial will be made absolute; but in the meantime it must stand over till the result of the appeal be known.

Rule discharged.

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A railway company cannot legally charge a greater sum for the carriage of a package containing several parcels belonging to different persons, than for a package containing several parcels all belonging to one person.

Where a railway company refused to carry, at the ordinary rate, packed parcels tendered by a carrier, whereby he was obliged to send them by a more circuitous route and at a greater expense:—*Held*, that he was not entitled to recover damages for an alleged loss of business.

Seem, that the 14th section of the Great Northern Railway Company's Act, 13 & 14 Vict. c. lxi., which provides that the Company may charge for the carriage of parcels not exceeding five hundred weight any sum they may think fit, means any "reasonable sum."

THE third count of the declaration stated, that the defendants were common carriers of goods for hire from London to Leeds; and the plaintiff, on &c., tendered to the defendants, at the proper place for that purpose, a parcel of goods of the plaintiff, and requested them to receive and carry the same from London to Leeds; and the defendants then had ample convenience for so doing; and the plaintiff was ready and willing to pay the defendants their lawful charges for the receipt and carriage of the said parcel of goods, of which the defendants then had notice: yet the defendants, though they did receive and carry the goods of other persons on the occasion aforesaid from London to Leeds, did not nor would, when so requested or at any time, receive and carry the said parcel of goods of the plaintiff from London to Leeds at or for their lawful charges, but refused so to do.—The fourth, fifth, sixth, and seventh counts were similar to the third; and the seventh concluded with the following allegation:—By reason of which premises in the last five counts respectively mentioned, the plaintiff was unable to carry on his trade and business of a carrier and forwarder of parcels with the same facility, dispatch, and convenience as he otherwise might have done, and was also obliged to transmit the said goods in the last five counts mentioned to the several places aforesaid by more circuitous and dilatory routes and means of conveyance, and at a greater expense to the plaintiff than if the defendants had carried the same for the plaintiff.

Pleas (inter alia) to each count.—First, not guilty. Secondly, that the plaintiff was not ready and willing to pay to the defendants their lawful charges for the receipt and

carriage of the said parcel of goods, as in that count alleged.—Upon which issues were joined.

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At the trial, before *Martin*, B., at the London Sittings after Hilary Term, 1855, the following facts appeared:—The plaintiff was a carrier, whose chief office was in London. His business was to collect small parcels, and make up all those for a particular town and delivered to him on the same day, into one package, which he sent by railway to his agent in that town, who opened the package and delivered the parcels to the various parties to whom they were directed. The defendants were common carriers of goods by their railway. On several occasions the plaintiff made up packages of this description, and sent them to a receiving-house of the defendants for conveyance to Leeds. These packages were about thirty pounds weight, and the ordinary charge for the carriage was 1s. 6d., which was tendered, but the defendants' clerk refused to receive the packages unless 7s. 6d. was paid, and the packages were opened to satisfy him that they did not contain other parcels. The plaintiff was in consequence obliged to forward the packages by another and more circuitous route. This mode of sending packed goods was well known in the carrying trade; and it had been a common practice for persons residing in the country, who ordered goods of various tradesmen in London, to direct the goods to be sent to one of the tradesmen, and he packed them all in one package and sent it by railway to the person in the country. In these cases it was usual for the party who made up the package to charge 2d. for each parcel to persons not in the same trade as himself. Sometimes these packages contained parcels for different persons, though in general they were directed to one person only. The defendants had carried packages containing several parcels for merchants and tradesmen without extra charge, but there was no evidence that the defendants knew that the parcels so packed were for different persons.

It was submitted on the part of the defendants, first, that

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under the 13 & 14 Vict. c. lxi. s. 14 (a), they were entitled to charge for small packages any sum they might think fit. Secondly: that a packed parcel differed from an inclosure, which consisted of several parcels all belonging to one person; and that the defendants were entitled to charge extra for packed parcels, inasmuch as they were subject to greater risk and liability where the parcels belonged to several persons. It was submitted on behalf of the plaintiff, that this was not a case within the 13 & 14 Vict. c. lxi. s. 14; that there was no difference between a packed parcel and an inclosure; and that the defendants were bound to charge all persons equally. The learned Judge was of opinion that the defendants were not entitled to charge what they thought fit, but were bound to make a reasonable charge; and he left it to the jury to say, first, whether the sum tendered to the defendants for the carriage of the packages was a reasonable sum; secondly, whether there was any difference between packed parcels and inclosures, at the same time calling their attention to the judgment in *Pickford v. The Grand Junction Railway Company* (b); and thirdly, whether the defendants charged the plaintiff equally with other persons. The jury found a verdict for the plaintiff with 40s. damages, and 200*l.* for his loss of business; and they also found that the defendants had made unequal charges, and that there was no difference between packed parcels and inclosures.

(a) Enacts, "That, as regards small packages and single articles of great weight, notwithstanding the rate of tolls prescribed by this Act, the said companies may lawfully demand the tolls following, (that is to say); For the carriage of small parcels, that is to say, any parcel not exceeding five hundred pounds weight, the said companies

may demand any sum which they may think fit: Provided always, that articles sent in large aggregate quantities, although made up of separate parcels, such as bags of sugar, coffee, meal, and the like, shall not be deemed small parcels, but such term shall apply only to single parcels in separate packages."

(b) 10 M. & W. 399.

Bramwell, in Easter Term (April 17), obtained a rule nisi for a new trial, on the following grounds.—First: that, under the 13 & 14 Vict. c. lxi. s. 14, the defendants were entitled to make such charges as they thought fit for their parcels, their respective weight being under five hundred pounds, provided they charged all persons equally; and the jury should have been so directed. Secondly: that, whether or no they were so entitled, they were entitled to charge extra for packed parcels; and the Judge should have so told the jury. Thirdly: that there is a difference between, and a right to charge differently for, packages containing other packages directed to and intended for different consignees, and packages containing other packages directed to and intended for the same consignee; and the Judge should have so directed the jury. Fourthly: that the verdict of the jury in finding that the defendants were not entitled to make such extra charge, and that there was no such difference between the two classes of parcels, is against evidence. Fifthly: that the 200*l.* found by the jury for general loss of business is not recoverable.

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Montagu Chambers and *Maonamara* shewed cause (a). —First, the 13 & 14 Vict. c. lxi. s. 14, does not authorise the company to charge what they think fit for these packages. The 13th section prescribes the tonnage rate for goods. The 14th section regulates the charge for small “packages and single articles of great weight.” The object of that enactment was to enable the company to make a remunerative charge for the risk incurred in carrying small parcels of great value, such as bankers’ and jewellers’ parcels, deeds, &c. If the packages in question are not within the proviso containing the exemption, as not being “articles sent in large aggregate quantities made up of separate parcels;” neither are they within the definition there given of “small

(a) In Michaelmas Term, 1855, (Nov. 9), and Hilary Term, 1856, (January 12).

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parcels," because they are not "single parcels in separate packages." If there is any ambiguity in the enactment, according to the rule which prevails as to private Acts, it must be construed most strongly against the company and in favour of the public. Some light may be thrown on the meaning of the legislature by comparing this enactment with the 205th section of the repealed Act 9 & 10 Vict. c. lxxi. That section, which prescribed the toll for small packages and articles of great weight, contained a proviso that it should not be lawful to include in one package several parcels of various sorts, and intended for various individuals; but that the company might charge a separate sum for each such parcel, although many were included in one package. That prohibition is omitted in the 14th section of the 13 & 14 Vict. c. lxi.—Secondly, it is said, that the defendants are entitled to charge extra for packed parcels. [*Martin, B.*—That point was not raised at the trial.] The third objection is, that the jury ought to have been told, as a matter of law, that there was a difference between, and a right to charge differently for, packages containing parcels for several consignees, and for one consignee. That proceeds on the assumption that all the tradesmen's packages were for one consignee, which was not the fact. The learned Judge called the attention of the jury to the law on the subject as laid down in *Pickford v. The Grand Junction Railway Company* (a). The only difference suggested is, that, in cases of conversion, the company would be liable to several actions at the suit of the owners of the different parcels. But they have no right to make an extra charge for the purpose of indemnifying themselves against their own wrongful act. It is only in cases of misfeasance that they would be liable to several actions. In many cases the consignor alone could sue, as for instance, where the consignee is merely his agent, or the consignor

(a) 10 M. & W. 399.

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has a special property in the goods: *Freeman v. Birch* (a). The difference of risk, if appreciable, is so trifling as to fall within the principle "de minimis non curat lex." There was no affirmative evidence of any difference between packed parcels and inclosures, and the jury found there was none. Moreover, by 8 & 9 Vict. c. 20, s. 90 (b), (which is incorporated with the 13 & 14 Vict. c. lxi), the defendants were bound to charge all persons equally under like circumstances: *Crouch v. The Great Northern Railway Company* (c); and the jury have found that they have not done so. *Parker v. The Great Western Railway Company* (d), and *Edwards v. The Great Western Railway Company* (e) are express authorities that a railway company cannot charge a carrier more for packed parcels than they do the rest of the public. [They then argued that the verdict was not against evidence.]—Lastly, with respect to the damages: This is an action of tort, and a loss of business is the natural and direct consequence of the defend-

(a) 3 Q. B. 492, note.

(b) "And whereas it is expedient that the company should be enabled to vary the tolls upon the railway, so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorised to be taken, either upon the whole or upon any particular

portions of the railway, as they may think fit, provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances, and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular company or person travelling upon or using the railway."

(c) 9 Exch. 556.

(d) 11 C. B. 545.

(e) 11 C. B. 588.

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ants' wrongful act. [*Alderson*, B.—How was the plaintiff's trade injured except by payment of an extra charge?] He would require more capital for carrying on his trade, and he must either discontinue sending packed parcels or send them by a circuitous route. *Hadley v. Baxendale* (a) was an action on a contract. But applying the rule there laid down, the defendants might reasonably contemplate that the plaintiff would be injured in his trade by their refusal to carry his goods. The jury were at liberty to give exemplary damages, if they thought that the defendants committed the wrongful act with intent to stop the plaintiff's trade. It is analogous to the case of a nuisance, where, in the first action, nominal damages only are recovered, but afterwards substantial damages.—They referred to 2 Tidd, Prac. 890.

Wordsworth and *Rockfort Clarke* in support of the rule.—These packages, being under five hundred weight, are "small parcels" within the meaning of the 14th section of the 13 & 14 Vict. c. lxi. The learned Judge should have told the jury, that, in point of law, there was a difference between, and a right to charge differently for, packed parcels and inclosures. The defendants are only bound to charge equally to all persons *under the same circumstances*. The proviso in the 205th section of the 9 & 10 Vict. c. lxxi. shews that the legislature considered that there was an appreciable difference between the two descriptions of parcels. There is also an additional risk, inasmuch as, in the case of loss, the carrier would be subject to several actions at the suit of the various consignees. Where a vendor delivers goods to a particular carrier by order of the vendee, the property in the goods vests in him, and he alone can maintain an action in respect of their loss: *Daws v. Peck* (b). But if the property has not passed out of the

(a) 9 Exch. 341.

(b) 8 T. R. 330.

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vendor, he is the proper party to sue: *Coats v. Chaplin* (a). It may be, that the vendee might maintain trover for the loss of the goods, and the vendor sue in respect of the breach of contract. *Parker v. The Great Western Railway Company* (b) is not decisive of this point; because there the company's Act required that the charges should be *reasonable*; here the company are at liberty to charge for small parcels what they think fit. [Alderson, B.—Surely the Act must mean “such reasonable charges as they think fit.”] Besides, in that case, the company charged an extra rate to carriers beyond the ordinary charge to other persons. In *Parker v. The Great Western Railway Company* (c) and *Edwards v. The Great Western Railway Company* (d), the point was not raised as to the difference between packed parcels and inclosures.—They also referred to *Pickford v. The Grand Junction Railway Company* (e), *Crouch v. The London & North Western Railway Company* (f), *Spicer v. Brawn* (g).—Then with respect to the question of damages. *Hadley v. Baxendale* (h) is a conclusive authority that the plaintiff is not entitled to compensation for a general loss of trade. [Upon this point they were stopped by the Court].

POLLOCK, C. B.—We are all of opinion that so much of the rule as prays for a new trial on the ground of misdirection must be discharged; and that so much of the rule as prays that the verdict may be reduced, excluding the 200*l.* found for special damage, must be absolute. With respect

(a) 3 Q. B. 483.

(b) 2 Man. & G. 253.

(c) 11 C. B. 545.

(d) 11 C. B. 588.

(e) 3 Railw. Cas. 538.

(f) 14 C. B. 255.

(g) Exch., Trinity Term, June 12, 1856, not reported. It was a rule to shew cause why a sum of money paid into Court in lieu of

bail should not be paid out to the defendant, on the ground that the declaration was in a different form of action to that stated in the affidavit to hold to bail. *Rowley* shewed cause, and *Willes* supported the rule.—Rule discharged.

(h) 9 Exch. 341.

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to the latter point, it seems to me to lie in the smallest compass. The declaration consists of several counts, and in one of them there is an allegation, that, by reason of the premises, the plaintiff has been injured in his trade. We are all of opinion, that, upon a declaration so framed, the damage alleged cannot be recovered. It is unnecessary to inquire, whether it could be recovered under any other form of declaration; it is sufficient to say, that it cannot under this allegation and the general proof given that the defendant was of opinion that his trade was diminished in consequence of the conduct of the defendants.

In disposing of the other part of the rule, it may be convenient to refer to the grounds on which it was granted. The first is, "that, under the 13 & 14 Vict. c. lxi, s. 14, the defendants were entitled to charge such charges as they thought fit for their parcels, their respective weight being under five hundred pounds, provided they charged all parties equally; and the jury should have been so directed." Upon that point it is not necessary, in order to dispose of the rule, that we should give any judgment. The second ground is, "that, whether or no they *were* so entitled, they were entitled to charge extra for packed parcels; and the Judge should have so told the jury." I am of opinion that the Judge ought not to have so told the jury; and that, whether or no the defendants were entitled to charge extra for packed parcels, is, in my opinion, a question of fact, and not of law. It is not every difference in the articles carried, which will warrant a difference in the rate of charge. No doubt, there are some goods which it may be more inconvenient or more expensive to carry, and as to which the carrier might well say, that he would not carry them at the same price as other goods; but if there be a difference, that is fit to be submitted to the jury. It seems to me, that, in principle, there is no difference between a packed parcel and an inclosure; but, supposing that there is, it ought to be submitted to the jury as a matter of fact, whether the dif-

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ference is such as to justify an increased rate of charge. I think that the learned Judge would have been wrong in point of law, if he had told the jury that the defendants were entitled to charge extra for packed parcels. Nothing can illustrate the case more strongly than the subject of insurance. In life assurance the difference in risk is notorious. So, with respect to marine insurance, a person who merely dealt with the subject geographically, by looking at a map or a globe, might well say, that there was such a difference in certain voyages, that there must be a right to make a different charge. But it may be, that the circumstances are such, that, although there is that difference in the risk, yet there is no right to charge more; but the question ought to be submitted to the jury. The third ground stated in the rule is, "that there is a difference between, and a right to charge differently for, packages containing other packages directed to and intended for different consignees, and packages containing other packages directed to and intended for the same consignee; and that the Judge should have so directed the jury." This admits of the same answer. The learned Judge left the question to the jury, and they found, as a matter of fact, that, although there was an apparent difference, yet there was no real difference, so as to warrant a different charge. The fourth ground mentioned in the rule is, "that the verdict of the jury in finding that the defendants were not entitled to make such extra charge, and also that there was no such difference between the two classes of parcels, is against evidence." I am of opinion that it is not. In no single instance has it occurred, that there have been two actions against a carrier in respect of an inclosed parcel because the inclosures belonged to two different persons. Then, how can it be said, that there is a greater risk or a greater liability? We must look at matters of this sort practically, and not draw nice distinctions, when there are facts which lead to a correct conclusion. For these reasons it appears to me, that

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so much of the rule as prays for a new trial must be discharged, and that so much of the rule as prays for a reduction of the damages must be absolute.

ALDERSON, B.—I am of the same opinion. The only practical question for us to determine is, whether the charges are equal; and that must depend on whether or no there is any real difference in the risk between packed parcels and inclosures. That question was left to the jury; and they found that there is none. As to that, I agree entirely with them. Moreover, I do not think that we should have much difficulty in construing the 14th section of the 13 & 14 Vict. c. lxi; it means such charges made by the company as, in the opinion of a jury, are reasonable charges. I think that the company are not at liberty to charge what they please; and that the word "reasonable" must be considered as introduced into the section. This is merely an obiter dictum, and not necessary for the decision of the case; but I give it as my opinion. With respect to the last point, I agree that the 200*l.* ought not to have been added to the damages.

MARTIN, B.—I am also of opinion that the rule as regards a new trial should be discharged. The action is founded on the common-law liability of the defendants, as common carriers, to carry goods for reasonable reward; and the declaration contains several counts charging a breach of their duty as such carriers.—[His Lordship then adverted to the evidence, and proceeded]—The jury found that there was no difference between packed parcels and inclosures; and therefore, if that finding be correct, there ought to be no new trial. The first case on this subject is *Pickford v. The Grand Junction Railway Company* (a). That was a special case prepared by the parties, who

(a) 10 M. & W. 399.

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wished to ascertain what the law was on the subject of packed parcels:—Several packages had been made up by the plaintiff and tendered to the defendants, for the express purpose of having the law settled; and it was supposed that the decision on the questions then raised would have set the matter at rest. The case was argued on behalf of the company by the late Mr. *Cowling* (one of the most acute and able men ever at the bar), and the only additional risk which suggested itself to his mind was, that, by reason of goods belonging to different people being contained in one parcel, the carrier might be liable to several actions at the suit of the different owners, instead of one action at the suit of a single owner. The Court were of opinion, that the plaintiff was entitled to judgment; and Baron *Parke*, in delivering it, read the following passage, which was not necessary for the decision of the case:—"But then it is argued on the part of the defendants, that there really is an increased responsibility, arising from the simple fact that each parcel is the property of a distinct owner, because it is said, that, in the event of a misdelivery, the company would be liable to several actions of trover instead of one; and even in case of loss or damage by neglect, each separate owner might maintain an action on the custom of England, in respect of his own goods. It is very doubtful at least, whether, on the custom of England, separate actions could be maintained, as the relation of employer and carrier would not have subsisted between them and the company, but between them and the plaintiffs. As actions of trover, however, could be maintained, it would not be unreasonable to allow some additional remuneration, on account, not of the liability to pay greater damages, for they would be the same in both cases, but to pay the same damages by means of different suits. We are relieved, however, from the necessity of deciding what the precise amount of additional compensation (which at all events should be trifling) on this account should be, be-

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cause it is admitted on the special case, that the sum tendered is proper, unless the defendants had a right to charge for separate parcels " &c. Now, that is the origin of all the controversy which has taken place on this subject; and I listened at the trial, and I have listened now, for any distinction to be pointed out between packed parcels and inclosures, except this; and I have heard none. The next case is that of *Parker v. The Great Western Railway Company (a)*, and all that there passed having reference to this subject was, that the Court, in a deliberate judgment, decided that there was no distinction between carriers and other people. I agree with Mr. *Clarke* that there is nothing in that case conclusive of the present; but in a subsequent case of *Parker v. The Great Western Railway Company (b)*, this point was expressly raised by the fourth and fifth questions; and the Court were of opinion that Mr. *Parker*, who stood in the same position as the present plaintiff, was entitled to recover. *Maule, J.*, in distinct terms, says, that there is no difference whatever between a parcel sent to an individual containing parcels belonging to a variety of people, and parcels sent to an individual all the contents being his own. There is, therefore, an express decision of the Court of Common Pleas upon the very point now in controversy. I need not occupy time by referring to the case of *Edwards v. The Great Western Railway Company (c)*; it was argued and the judgment delivered about the same time as *Parker v. The Great Western Railway Company*, the counsel agreeing that the same judgment should be given in both cases. In my opinion, these cases are directly in point; but the misfortune is, that it does not seem to have occurred to the Courts to call attention to what was thrown out in *Pickford v. The Grand Junction Railway Company*. In a case of *Crouch v. The Great Northern Rail-*

(a) 7 Man. & Gr. 253.

(b) 11 C. B. 545.

(c) 11 C. B. 558.

way Company (a), which was identical with the present; the counsel for the defendants treated the decision of the Court of Common Pleas as conclusive, and *Parke*, B., said, "The Court of Common Pleas have already decided the point, and we are bound by their decision." There is therefore the express decision of the Court of Common Pleas, and the only proper mode of raising the question again is by writ of error. But let us see whether the view contended for on behalf of the defendants be really correct, viz. that, if a person in London makes a business of collecting parcels for a variety of persons residing in the country (say Leeds), and sending them in one parcel to his agent there to be distributed amongst those persons, who pay him for the carriage, and if another person in London makes up a parcel of similar articles, but sends them down to Leeds to a person to whom they all belong, the carrier would be justified in charging a higher rate for the first than for the second parcel; so that, if two parcels were taken at the same time to the carrier, and he was told that the one contained separate parcels for a variety of people, and that the other contained precisely similar separate parcels, all for the same person, then, according to the argument for the defendants, he would be justified in asking 5s. for the carriage of the first, and 1s. only for the carriage of the second,—that is the position, and let us see if there be any reason in it. The carrier is bound by the common law to forward the one parcel to A. in Leeds, and the other to B. in Leeds; when the one parcel gets to A. he will open it and deliver the several parcels to the different owners, and when the other parcel gets to B. he will open it and probably put the different parcels on the shelves of his shop; but the carrier has nothing to do with that,—he is required to deal with two parcels of the same articles and the same value; what business is it of his what is done with

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them at Leeds? A person not in the law, would say he could not see the difference between carrying two parcels of the same articles and same value to the same town, or why an extra charge should be made by the carrier who is under an obligation to charge equally to all. It is said, that each of the individuals to whom the separate parcels belong, might, in the event of a misdelivery, maintain an action of trover. But is that so? I apprehend there is no doubt, that the proper action against a carrier for a misdelivery is an action on the custom of the realm or bailment, or in other words on the contract, and that upon a single bailment there could not be two actions. There is only one contract with the carrier; and two obligations cannot be put upon him by virtue of the one contract. No matter how many parcels are contained in one package, or to whom they belong; he contracts with the person who brings him the entire parcel; and therefore, upon the common law liability, one action only could be maintained. In a case of *Youl v. Harbottle* (a), referred to in 2 Saund. 47 f, it was held by Lord *Kenyon*, at Nisi Prius, that, in the event of a misdelivery of goods, an action of trover might be brought; that is to say, that, although the original liability of the carrier was founded on the contract or bailment, yet if he dealt with the property entrusted to him in a manner different from the purpose for which it was placed in his hands, that was a conversion. There is also a case in the Court of Common Pleas, reported in 4th Bingham (b), where *Park, J.*, and *Burrough, J.*, were of opinion that the consignor of goods might maintain trover for a misdelivery; and *Gaselee, J.*, was of opinion that he could not. These are the only two cases of which I am aware, where it has been held that trover would lie against a carrier for misdelivery. But, assuming that trover could be maintained, is there anything in either of those cases to shew that several actions of

(a) Peake's N. P. 68.

(b) *Stephenson v. Hart*, 4 Bing. 476.

trover could be maintained by the different owners of the packages? It will be found in the case in Bingham (and I have very little doubt that it was so in the other case), that there were two or three special counts, and that they all failed by reason of the then state of the law. If the question of an action of trover against a carrier for misdelivery were to be considered now, for the first time, the Courts would probably hold, that trover was not maintainable. In *Foulds v. Willoughby* (a), the subject of conversion, and the right to maintain trover, is dealt with, and the law is laid down by this Court in a way which has been acted upon ever since, and most satisfactorily. I allude especially to the judgment of my Brother *Alderson*: and if his view be correct, as I believe it to be, it utterly excludes the case of misdelivery by a carrier as a conversion. But there is nothing in these cases to shew that, although the Courts did allow the action of trover to be maintained, for the purpose of preventing injustice, they would allow several actions to be maintained in respect of the different packages in the same parcel. Three cases were cited, which, it is said, are authorities on the point. The first is *Daves v. Peck* (b). That was an action against a carrier in respect of some goods; and on the trial it appeared that there had been a regular invoice by the plaintiff of the sale of the goods to another person. It was said, and truly enough, that when there is a perfect delivery of goods to a carrier, by law the delivery to the carrier is a delivery to the vendee, and they become goods sold and delivered; and the Court held that the action ought to have been brought in the name of the owner of the goods, that is, the vendee, and that it did not lie in the name of the vendor. I am not sure whether it would not now be held that the action might be brought in the name of either; but that is perfectly immaterial; what the Court there held was, that, where there is no express

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(a) 8 M. & W. 810.

(b) 8 T. R. 330.

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contract, but the goods are delivered and a carrier receives them in the ordinary course of business, the contract is with the owner of the goods; there is not a syllable to be found in the case to the effect that several actions of trover might be brought in respect of one parcel of goods. The case of *Coates v. Chaplin* (a) was an action brought against Messrs. Chaplin in respect of packages of goods ordered by Morrison & Co. of the plaintiffs, who were manufacturers at Paisley. It appeared that the goods had been sent up to London, but nothing had been done to satisfy the 17th section of the Statute of Frauds; and the Court of Queen's Bench held that the property in the goods remained in Coates, and that he might maintain the action. There again not a syllable is said with respect to two actions being maintainable. With respect to *Spicer v. Brown*, that was a question as to the payment of money out of Court. I can indeed imagine a case where an action of trover or several actions of trover might be brought against a carrier; but it certainly seems to me that several actions could not be maintained for a simple misdelivery. If a carrier cuts open a parcel, and takes the goods out, and then converts them to his own use, he is in the condition of a person who is dealing with another's goods; and if a person deal with goods in an illegal way, either by destroying them or consuming them, he is responsible to every owner of the goods, not as a carrier, but as a person who deals unlawfully with another man's property. As to the way in which I dealt with this case at the trial, I stated that my own view was in conformity with the decision in the Court of Common Pleas; but that there was a statement in a judgment of the Court of Exchequer in *Pickford v. The Grand Junction Railway Company* (c) which I read; and I left it to them to say, whether, assuming that to be so, they saw any ground for the defendants charging any further sum in re-

(a) 3 Q. B. 483.

June, 1855, not reported.

(b) Exch. Trinity Term, 12th

(c) 10 M. & W. 399.

spect of the supposed liability to several actions for improper dealing with the goods; and they said that in their opinion there was not. In that opinion I entirely concur; and I think it would be wrong to allow carriers to charge a greater sum in respect of such supposed liability, there not being a single instance of several actions having been brought in respect of several parcels contained in the same package. I am therefore of opinion that there is no difference between what is called a package and an inclosure; and, inasmuch as the defendants, by their own admission, acted differently towards the plaintiff in respect to packed parcels than to other persons in respect of inclosures, the question upon the 14th section of the Act does not arise.

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With respect to the damages, I concur with the rest of the Court; because I conceive, that, under this declaration, the damages are not claimed. But if a declaration was framed in this way—that the plaintiff was a carrier, and that his business was to collect goods for the purpose of sending them down by railway; and that the defendants designedly refused to carry parcels which they were bound by law to take, for the purpose of getting a monopoly in their hands and destroying the plaintiff's trade—upon a declaration framed in that way, and upon being satisfied that the railway company wilfully transgressed the law with a view to get a monopoly of a certain class of business and destroy the business of another, I am not prepared to say that a jury might not properly give vindictive damages to a person so oppressed. But that is not this case. Whenever the question arises, I shall be perfectly free to give an opinion upon it. I concur in opinion that the 200*l.* damages cannot be supported.

Rule absolute accordingly.

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Jan. 19.

HERNAMAN and Another v. BOWKER.

Goods seized by a sheriff under a *fi. fa.* were valued and delivered to the execution creditor, upon a *bona fide* purchase by him; but no bill of sale was executed:—*Held*, that there was a valid sale of the goods.

TROVER for goods and chattels.—Pleas: not guilty, and not possessed.—Upon which issues were joined.

At the trial, before *Crowder, J.*, at the Liverpool Summer Assizes, 1855, it appeared that the plaintiffs were the assignees of certain persons trading under the name of Huddart & Co., who had become bankrupt. Prior to the bankruptcy, the defendant had obtained a judgment against Huddart & Co. for 252*l.* 1*s.* 10*d.*, and on the 4th of June a writ of *fieri facias* issued on that judgment. On the following day the sheriff delivered his warrant to the bailiff, who, on the 6th of June, seized the goods in question under the writ. Immediately after the seizure, the bailiff went to the defendant, and asked him if he would like to purchase the goods. The defendant consented, and the goods were then valued at 105*l.*, and delivered by the bailiff to the defendant, a formal invoice having been previously made out; but no bill of sale was executed. At an earlier period of the same day, Huddart & Co. committed the act of bankruptcy upon which the fiat issued. The defendant had no knowledge of the act of bankruptcy until the 18th of June, when he was served with notice of it.

It was submitted, on behalf of the defendant, that the execution was protected by the 123rd section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106. It was contended, on the part of the plaintiffs, that there was no valid sale of the goods, inasmuch as there was no assignment by bill of sale and no money passed. The learned Judge directed a verdict for the plaintiffs, reserving leave for the defendant to move to enter a verdict for him.

Hugh Hill, in the following Term, obtained a rule nisi accordingly; against which

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Atherton and *Manisty* now shewed cause.—There was no execution by seizure *and sale* of these goods, as required by the 133rd section of the Bankrupt Law Consolidation Act. The ordinary course is for the sheriff to sell either by auction or bill of sale. Perhaps the sheriff might authorise his bailiff to sell in any other way, but of that there is no evidence; and without express authority the bailiff is not warranted in departing from the prescribed course. Suppose the goods were worth 500*l.*, and the sheriff valued them at 100*l.*, and then delivered a share to the purchaser in the name of the whole, would that be a valid sale? [*Martin*, B.—The bailiff had authority to sell, and the law does not require that a sale of personal chattels should be made in any particular way. A sale by auction or bill of sale is only a mode of exercising the authority which the law gives.]—They referred to *Hobson v. Holt* (a).

Hugh Hill appeared in support of the rule, but was not called upon to argue.

PLATT, B.—The rule must be absolute. By the terms of the warrant, the sheriff is commanded that he “*cause to be made*” of the goods of the debtor the amount recovered by the judgment. Then how is he to do that? By seizure and sale. Here the sheriff has seized and he has sold. It may be well, as a matter of caution, to have the goods particularised in a bill of sale, in order to avoid any dispute as to their identity; but that is not necessary to render the sale valid. If the sheriff took a chair and delivered it to the purchaser in the name of all the goods, I do not see any objection to that mode of sale. No doubt, if he sold the goods for less than their value, he would be responsible; but in this

(a) Exchequer Chamber, June 14, 1851. This case was argued on a bill of exceptions to the ruling of *Rolfe*, B.; and the question was, whether, upon the particular facts, there was evidence for the jury of a sale by the sheriff.

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case a fair valuation was made, and the transaction was bonâ fide.

MARTIN, B.—This is a question of title to the goods, and I am of opinion that the defendant has a right to them. The law is, that the sale must be before notice of any act of bankruptcy. Now here the notice was on the 18th of June, and the sale took place on the 6th. The only question is as to the manner in which the sale was effected; and I can see nothing to prevent the sheriff from selling in the way he has done. It is not absolutely necessary that he should sell by an instrument under seal. All that is required is, that he shall sell, and it is not incumbent on him to do that by one means more than another. Mr. *Atherton* has put the case of a sale under value; but where that is suggested, it is a question for the jury whether it is a real sale or not. Besides, if the sheriff sells in an improper manner or for less than the goods are worth, he will be liable to an action. In this case there is no doubt it was a real sale.

BRAMWELL, B.—The defendant has taken possession of the goods under a sale by the sheriff. It is true that the defendant is the execution creditor, but that makes no difference. I should be sorry to say anything which would encourage a doubt as to this mode of sale being valid. Mr. *Atherton's* proposition is not only inconvenient but unwarranted by law. A general authority is given by the sheriff to his officer to levy, and it is proposed to shew that there is some limitation of that authority by the practice as to the mode of executing it. If that were established, the consequence would be, that a purchaser from a sheriff might get a title to the goods in one county, but not in another. But that is not so. A bailiff has a general, not a special authority to sell; and the doctrine contended for is opposed to the legal principle, that, where a person gives a general authority, he has no right to restrict it as against a person who has

acted on that authority. If there is any inconvenience in this mode of selling, it is easy to alter it. Here there was ample evidence of a bonâ fide sale.

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Rule absolute.

THE ATTORNEY-GENERAL v. RUCK and Others.

Jan. 30.

INFORMATION by the Attorney-General. The first count stated that Robert Ruck, Henry Beal, Joseph Hobbs the elder, James Hobbs, and Joseph Hobbs, after the 4th of August, 1845, and before the exhibiting of the information, to wit, on the 10th of June, A.D. 1852, did assist, and were then and there otherwise concerned, in unshipping certain foreign goods of great value, the duties of Customs for which had not been paid or secured, that is to say, divers, to wit, three hundred and forty gallons of foreign spirits of great value, &c., the said goods being then and there liable to payment of the duties of Customs to her Majesty on importation thereof into the United Kingdom, and which had been imported into the United Kingdom, to wit, &c., contrary to the form of the statute, &c.: whereby, and by force of the statute, the said several offenders have severally, and each of them hath for his said offence, forfeited and lost the sum of 1000*l.*, being treble the value of the said goods.—Averment: that the Commissioners of her Majesty's Customs have elected to sue in this behalf in lieu and instead of a penalty of 100*l.*

An information under the Customs Act, 8 & 9 Vict. c. 37, charged, in the three first counts, five defendants with several offences on different days; and, in the four following counts, it charged four of those defendants, together with four others, with similar offences on other days. A verdict having been found for the Crown,—*Held*, no ground for arresting the judgment, for the defect (if any) might be cured by the mode in which the judgment was entered up.

The second and third counts charged the same defendants with similar offences on the same day.

The fourth, fifth, and sixth counts charged Robert Ruck, Henry Beal, Joseph Hobbs the elder, James Hobbs, Joseph

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Beal, Joseph Ledger, Edward Clarkson, and William Fairbrass with similar offences on the 1st of February, 1853; and the seventh and eighth counts charged the last-mentioned defendants with similar offences on the 1st of March, 1853, and on four other days (a).

Plea, not guilty; upon which issue was joined.

The information was tried before *Pollock*, C. B., at the Middlesex Sittings after Trinity Term, 1855, when a verdict was found for the Crown against all the defendants (b).

Wordsworth, in the following Term, obtained a rule nisi to arrest the judgment; against which,

(a) The following is an analysis of the information:—

<i>Defendants' Names.</i>	<i>Counts of Information.</i>	<i>Date of Offences.</i>	<i>Counts. As to Dates.</i>
Robert Ruck	1, 2, 3, 4, 5, 6, 7, & 8	10th June, 1852	1, 2, & 3
Henry Beal ditto . .	1st Feb. 1853	4, 5, & 6
Joseph Hobbs the elder	. . ditto		
James Hobbs	. . ditto . {	1st March, 1853, and on four other days	7 & 8
Joseph Beal	4, 5, 6, 7, & 8		
Joseph Ledger ditto		
Joseph Hobbs the younger	. . 1, 2, & 3		
Edward Clarkson . . .	4, 5, 6, 7, & 8		
William Fairbrass ditto		

(b) Robert Ruck, Harry Beal, and Joseph Hobbs the elder were found guilty on the first count, and not guilty on the second and third counts; Robert Ruck, Henry Beal, Joseph Hobbs the elder, James Hobbs, Joseph Beal, and William Fairbrass were found guilty on the fourth count; Robert Ruck, Henry Beal, Joseph Hobbs the elder, James Hobbs, Joseph Beal, Joseph Ledger, Edward Clarkson, and William Fairbrass were found guilty on the fifth, sixth, and eighth counts;

Robert Ruck, Henry Beal, Joseph Hobbs the elder, James Hobbs, Joseph Beal, and William Fairbrass were found guilty of one offence charged in the seventh count; Robert Ruck, Henry Beal, and William Fairbrass were found guilty of another offence charged in that count; and Robert Ruck, Henry Beal, Joseph Hobbs the elder, James Hobbs, Joseph Beal, and William Fairbrass were found guilty of a third offence charged in that count.

The *Attorney-General*, *Watson*, and *Cleasby* now shewed cause.—The case of *Rex v. Kingston* (a) is an express authority that it is no ground of demurrer that several different defendants are charged in different counts of an indictment for offences of the same nature. Lord *Ellenborough*, C. J., there says, "This would have been a good ground of application to the discretion of the Court to quash the indictment, for the inconvenience which may arise at the trial from joining different counts against different offenders; but where to the offences so charged in different counts there may be the same plea and the same judgment, there is no authority for saying that such joinder in one indictment is bad in point of law; nor is there any legal incongruity on the face of it to warrant us in giving judgment for the defendants on demurrer." It is said, however, that the Court will not on motion quash an information filed by the *Attorney-General*; and for that position *Rex v. Gregory* (b) is relied on. But that only applies to cases where an information is filed by the *Attorney-General* instead of an indictment being preferred before the grand jury; and even if it does not, the refusal of the Court to exercise its discretion cannot alter the legal effect of the information. Assuming, however, that there is a misjoinder of counts, that is no ground for arresting the judgment; for the Crown may enter a nolle prosequi as to some of the counts. Formerly, it was considered, that, where counts in tort were joined with counts in assumpsit, and a verdict was found for the defendant as to the former, and for the plaintiff as to the latter, the declaration was bad in arrest of judgment: *Bage v. Bromuel* (c): but now, in such a case, the defect may be cured by entering a nolle prosequi: *Kightly v. Birch* (d). It is not like the case of a misjoinder of counts, where the jury find general dama-

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v.
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(a) 8 East, 41.

(b) 1 Salk. 372.

(c) 3 Lev. 99.

(d) 2 M. & Sel. 533.

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ges: *Corner v. Shew* (a). Where two receivers were charged in the same indictment with separate and distinct acts of receiving, *Parke, B.*, ruled, that there was no ground for arresting the judgment: *Regina v. Hayes* (b). So, where three persons were charged with a larceny, and two others as accessaries, in separately receiving portions of the stolen goods, and the indictment also contained two other counts, one charging each of the receivers separately with a substantive felony in separately receiving a portion of the stolen goods, and the principals were acquitted, it was held that the receivers might be convicted on the last two counts: *Regina v. Pulham* (c). [*Alderson, B.*—It was formerly the practice to join in one indictment several offences of the same nature committed by different persons.] The defendants might have obtained an order to confine the evidence to some particular time: *Attorney-General v. Weeks* (d). Moreover, under the 16 & 17 Vict. c. 107, s. 267, there may be a joint information against several persons for the penalties severally incurred by each, and judgment may be entered up on any of the counts against such as are convicted, and for penalties of different amounts.

Wordsworth, for some of the defendants, in support of the rule.—There is no authority for including in the same information two sets of defendants charged with several offences. In *Cutsworth's case* (e), where the action was against two persons, the plaintiff declared against one of them for an assault and battery, and against the other for taking away his goods; and it was held that the defendants could not be joined in one action, because the trespasses were of several natures and against several persons. The proper mode of taking advantage of the objection is by motion in arrest of judgment: *Rex v. Rosevere* (f), *Rex v.*

(a) 4 M. & W. 163.

(b) 2 Moo. & R. 155.

(c) 9 C. & P. 280.

(d) Bunb. 223.

(e) Styles, 153.

(f) Bunb. 286, 295.

M'Leod (a). The forfeiture is imposed by a statute which prescribes the mode of proceeding for its recovery, and which ought to be strictly followed. The information professes to be founded on the 8 & 9 Vict. c. 87, but is not warranted by that Act. The 104th section provides that where the "offence shall have been committed by several persons jointly, or several persons shall have been concerned in the same, such several persons shall jointly and severally incur every such penalty; and it shall be lawful to proceed against such persons to recover such penalties jointly by one information, or severally by separate informations," &c. Neither is this information warranted by this 16 & 17 Vict. c. 107. The 267th section of that Act provides for cases where, on a joint information against several persons, some of them allow judgment to go by confession or default, or there is a difference in the amount of the penalty in which one or more are convicted, or where some of them are acquitted. There is nothing in that Act to authorise a form of information different from that prescribed by the 8 & 9 Vict. c. 87. The authorities relating to the entry of a nolle prosequi, where there is a misjoinder of counts in civil proceedings, have no bearing on this case, because an information of this kind is a criminal and not a civil proceeding. It is true, that question was left in doubt by *Attorney-General v. Radloff* (b); but the legislature seems to have considered these informations in the nature of criminal suits. The 263rd section of the 16 & 17 Vict. c. 107, provides that "in all suits or proceedings at the suit of the Crown for the recovery of any duty or penalty, &c., the parties thereto shall be entitled to recover costs against each other in the same manner as if such suits or proceedings were conducted and had between subject and subject, and the like amendments may be made in all such proceedings by the Judge or Court as may now be made in civil actions."

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(a) 3 Price, 203.

(b) 10 Exch. 84.

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Ribton for other defendants.—Under the 8 & 9 Vict. c. 87, s. 104, if the Crown wishes to proceed against several persons for separate penalties, there must have been separate informations. The 16 & 17 Vict. c. 107, s. 263, makes this alteration, that, upon a joint information against several persons, separate penalties may be recovered against each. The offences in question were committed before that Act came into operation. In the case of *Rex v. Kingston* (a) there was only one offence, here nine defendants are charged with five different offences. In 1 Chit. Crim. Law, p. 846, it is laid down that “so independent is the authority of the Attorney-General, that the Court will not quash his information on the motion of the defendant, but will compel him to plead or to demur.” If a *nolle prosequi* had been entered at the trial, some of the defendants might have been called as witnesses for the others.

POLLOCK, C. B.—I entertain considerable doubt whether the information is open to objection; but it is not necessary to say more than that so long as the Crown can, by entering a *nolle prosequi*, render the judgment perfect, we ought not to interfere. If the judgment is improperly entered up, the defendant may resort to a Court of error.

ALDERSON, B.—We do not know in what manner the Crown may enter up the judgment; and therefore we ought not to arrest it.

MARTIN, B.—A complete answer has been given to this application to arrest the judgment. In *Cutsworth's case* (b) no judgment could be entered up, because there was a joint verdict against two persons for separate offences. In this case we cannot interfere, because the Crown may enter up judgment in the way it thinks proper. Possibly the judgment, when entered up, may be erroneous, but at this stage we cannot interfere.

Rule discharged.

(a) 8 East, 41.

(b) Styles, 153.

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Jan. 29.

WATSON v. LANE.

COVENANT.—The declaration stated, that, by an indenture made between the plaintiff and the defendant, the plaintiff demised to the defendant certain premises, to hold the same from the 1st of April, 1841, for the term of fourteen years. And the defendant covenanted that he would deliver up to the plaintiff, at the end of the said term, the said premises, together with all fixtures therein.—Averment of performance of all things necessary on the part of the plaintiff.—Breach: that the defendant did not at the end of the term deliver up the fixtures.

Plea—Payment into Court of 5*l*. in satisfaction of the plaintiff's claim, and no damages ultra.—Issue thereon.

At the trial, before *Martin*, B., at the Middlesex Sittings in last Michaelmas Term, the following facts appeared:—The plaintiff, who was the owner of the equity of redemption of certain premises used as a brewery, by indenture demised them to the defendant for a term of fourteen years from the 1st of April, 1841. The indenture contained a covenant by the defendant to deliver up to the plaintiff the premises and all fixtures therein at the end of the term. When the premises were mortgaged, the fixtures in question were attached to them. The mortgage deed contained a power of sale in default of payment of the mortgage money. The defendant's term expired on the 1st of April, 1855; and, on the 10th of that month, the plaintiff demanded possession of the premises, but the defendant did not give them up. On the 13th of April, the mortgagee gave notice to the defendant to pay the rent, and deliver up the premises to him; and he afterwards sold the premises and fixtures to the defendant. The fixtures were of the value of 438*l*.

The defendant was tenant to the plaintiff, who was owner of the equity of redemption, under a lease whereby the defendant covenanted to deliver up to the plaintiff, at the expiration of the term, the premises and all fixtures therein. The term expired on the 1st of April, 1855; and, on the 10th, the plaintiff demanded possession, which was not given. On the 13th, the mortgagee gave notice to the defendant to pay the rent and deliver up the premises to him. The plaintiff having sued the defendant for a breach of his covenant in not delivering up the fixtures:—*Held*, that the defendant was not estopped from setting up the title of the mortgagee, and that the plaintiff could not recover the value of the fixtures, but

only the actual damage sustained by him in consequence of their detention from the 10th to the 13th of April.

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Under these circumstances, it was submitted on the part of the defendant, that the plaintiff was only entitled to nominal damages in respect of the detention of the fixtures from the 10th to the 13th of April. It was contended on behalf of the plaintiff, that the defendant, having received possession from the plaintiff, was estopped from disputing his title; and that, as the plaintiff had a right to the possession of the fixtures on the 10th of April, he was entitled to recover their full value. The learned Judge was of opinion that the doctrine of estoppel did not apply, and that the plaintiff was only entitled to recover in respect of the damage sustained by reason of his being deprived of the possession of the fixtures for the three days; and his Lordship left it to the jury to say whether the sum paid into Court was sufficient for that purpose. The jury found that it was, and a verdict was entered for the defendant, leave being reserved to the plaintiff to move to enter the verdict for him for the value of the fixtures.

Wilde in the same Term obtained a rule nisi accordingly; against which

Edward James and Aspland shewed cause.—The plaintiff is only entitled to recover for the detention of the fixtures from the 10th to the 13th of April, and the sum paid into Court is amply sufficient for that purpose. When the mortgagee gave notice to the defendant to deliver up the fixtures to him, the plaintiff's right to their possession, which was permissive only, was determined. If the defendant had delivered the fixtures to the plaintiff on the 10th of April, the latter would have had no right to keep them as against the mortgagee. [*Alderson*, B.—Is not the true test of damage the benefit which would have accrued to the plaintiff if the defendant had performed his covenant?] The only benefit which the plaintiff would have derived would have been the possession of the fixtures for three

days. The rule is now settled, that, though a tenant cannot deny that the person by whom he was let into possession had title at that time, he may shew that such title is determined: 2 Wms. Saund. 418 a, note; *Doe d. Stroode v. Seaton* (a). The same rule applies to chattels: *Allen v. Hopkins* (b), *Dickenson v. Naul* (c). If the complaint had been the not delivering up possession of the premises, what damage would the plaintiff have sustained beyond the loss of possession for three days? The mortgagee, by giving notice to the defendant to pay the rent to him, treated the plaintiff as a trespasser: *Doe d. Higginbotham v. Barton* (d). The jury have properly taken into consideration the real damage sustained by the plaintiff: *Oldershaw v. Holt* (e).

Wilde and *Milward* in support of the rule.—It is not competent for the defendant, who has received possession from the plaintiff, to shew that the latter has sustained no real damage by the breach of covenant, because a third party has subsequently claimed the fixtures. The plaintiff's right of action was complete on the 10th of April. *Homan v. Moore* (f) decided that a lessee, proceeded against by ejectment, and who has received notice from a claimant disputing his landlord's title not to pay him any more rent, and has been threatened with a distress by his landlord if he does not, cannot sustain an injunction in equity to restrain either the ejectment or the distress; for he is not permitted by such means to bring his landlord's title into dispute. It is an established rule, that neither the tenant nor any one claiming by him can controvert the landlord's title: *Doe d. Knight v. Smythe* (g), *Balls v.*

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(a) 2 C. M. & R. 728.

(b) 13 M. & W. 94.

(c) 4 B. & Ad. 638.

(d) 11 A. & E. 307.

(e) 12 A. & E. 590.

(f) 4 Price, 5.

(g) 4 M. & Sel. 347.

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Westwood (a), Doe d. Bullen v. Mills (b). It cannot be said, that there is an estoppel in respect of the premises, but not in respect of the fixtures. If trover had been brought against the defendant, he could not have set up title in a third person subsequent to the conversion: *Harves v. Watson (c).* Where the defendant, a wharfinger, acknowledged that certain timber on his wharf belonged to the plaintiff, it was held that he could not dispute the plaintiff's title in an action of trover, brought against him by the plaintiff for the timber: *Gosling v. Birnie (d).* *Allen v. Hopkins (e)* was the case of a plea of payment for goods to a person who had a right to enforce it. In *Oldershaw v. Holt (f)*, the plaintiff, who was entitled to substantial damages, had received some compensation, and therefore he could not recover it over again.

POLLOCK, C. B.—The rule must be discharged. The question is, whether the plaintiff is entitled to recover the full value of the fixtures, or only such damage as he has actually sustained. It is contended, that the defendant has no right to diminish the claim by setting up the title of a third person. Now the doctrine, which does not permit the title of another person to be set up, is, I apprehend, peculiar to the action of ejectment. I do not say so without authority, for *Ogle v. Atkinson (g)* expressly decided that a warehouseman, who has received goods on behalf of a consignee, may nevertheless refuse to deliver them to him, if they are the property of another person. *Heath, J.*, there said, "It is peculiar to the action of ejectment that he who is intrusted with the possession of land must deliver it back to his lessor, but that rule extends to no other action."

(a) 2 Camp. 11.
 (b) 4 N. & M. 25.
 (c) 2 B. & C. 540.
 (d) 7 Bing. 339.

(e) 13 M. & W. 94.
 (f) 12 A. & E. 590.
 (g) 5 Taunt. 759.

The main ground of that rule is the extreme importance of possession, which lengthened out creates a title, and in a certain time an indefeasible right. The question then comes to this, what has the plaintiff lost,—for to that extent he ought to be indemnified? The defendant's lease expired a few days before the mortgagee asserted his right. After the expiration of the lease, the plaintiff demanded possession of the premises. The defendant did not deliver up possession; but, before any action was brought, the mortgagee gave notice of his title, and required the rent to be paid to him. The defendant afterwards bought the fixtures; but that circumstance appears to me to make no difference, for the question is one of principle. The defendant is in the same situation as if an ejectment had been brought, judgment obtained, and execution issued on the 13th of April, and he had been turned out of possession by title paramount. The estoppel on the tenant merely amounts to this, that he is estopped from disputing the title of his landlord to the extent of the interest granted by the lease, but he is not estopped when the lease has terminated. Here it appears that the mortgagee, instead of taking possession pursuant to his demand on the 13th of April, transferred his title to the defendant; and then an action is brought against the defendant for a breach of his covenant to deliver up the fixtures. Then, what are the damages? The amount paid into Court is amply sufficient to cover them, if the plaintiff is not entitled to recover the full value of the fixtures. We are all of opinion that the plaintiff is not entitled to recover the full value of the fixtures; and therefore the rule must be discharged.

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ALDERSON, B.—I am of the same opinion.

MARTIN, B.—I am also of opinion that the rule ought to be discharged. The plaintiff, having mortgaged the premises and fixtures, remained in possession; they did not,

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however, belong to him, but to the mortgagee, who was entitled to enter and take possession of them. The defendant's lease having expired on the 1st of April, on the 10th the plaintiff demanded possession. If an action of ejectment had then been brought, the defendant would have had no defence against the plaintiff; but upon the 13th of the same month the mortgagee gave the defendant notice to pay the rent and deliver up possession of the premises to him. The plaintiff now seeks to recover the whole value of the fixtures from the defendant. If he could do so, this absurd consequence would follow:—that where a person hired a chattel and agreed to deliver it up on a certain day, and it afterwards turned out that the chattel was stolen, and the real owner demanded possession of it, the person who lent it might recover the whole value of the stolen chattel. No doubt, he might maintain an action, because the person who hired the chattel agreed to deliver it up on a certain day, but he would only be entitled to nominal damages. The authorities cited on behalf of the plaintiff have no application, neither has the doctrine of estoppel any reference to this case. I can conceive a case, where, upon a breach of covenant of this kind, the plaintiff would be entitled to substantial damages; for instance, if the fixtures were out of repair: but there was no evidence of that. In an action on a covenant in a lease to deliver up the land, the sum to be recovered would not be the value of the land, but the real damage sustained, which might be considerable or merely nominal.

Rule discharged.

HILARY VACATION, 19 VICT.

JINKS v. EDWARDS and Another.

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Feb. 11.

THE declaration stated, that, by an agreement in writing, dated the 7th of April, 1854, and made between the defendants and the plaintiff, and signed by the defendants, the defendants agreed to let, and the plaintiff agreed to rent and take, certain premises &c. for the term of one year from the 29th of September, 1854, to the 29th of September, 1855, and so on from year to year as long as the parties thereto should agree, at and under the yearly rent of 35*l.* &c.—Breach: That although the 29th of September, 1854, elapsed before the commencement of this action, yet the defendants did not nor would give or let the plaintiff into possession of the said premises before or on the 30th of September, 1854, or at any other time, but wholly refused so to do; whereby the plaintiff hath lost the possession thereof.

Demurrer and joinder therein.

By agreement in writing, the defendants agreed to let to the plaintiff certain premises, for the term of one year from the 29th of September, 1854, and so on from year to year as long as the parties thereto should agree:—*Held*, that there was an implied contract on the part of the defendants to give the plaintiff possession of the premises.

Hayes, Serjt., in support of the demurrer.—The declaration discloses no cause of action. The agreement does not contain any contract on the part of the defendants to give the plaintiff possession of the premises. It will be argued, however, on the authority of *Coe v. Clay* (a), that every person who lets premises impliedly undertakes to give possession of them. That doctrine cannot be supported. In *Drury v. Macnamara* (b) Lord Campbell, C. J., points out that the foundation of the judgment in *Coe v. Clay* was, that the instrument operated as a lease. [*Alderson*, B.—It is the same here.]

Bulwer appeared for the plaintiff, but was not called upon to argue.

(a) 4 Bing. 440.

(b) 5 E. & B. 612.

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PER CURIAM (a).—The case of *Coe v. Clay* is directly in point, and there must be judgment for the plaintiff.

Judgment for the plaintiff.

(a) *Alderson, B., Martin, B., Bramwell, B.*

Feb. 6.

BAILEY v. TENNANT.

By a marriage settlement, estates were limited to A. for life, with remainder to trustees for 600 years, to be computed from the decease of A., in trust, to raise portions for younger children, with remainder to his first and other sons successively in tail. Power was given to A., to create a rent-charge in favour of any second wife, and to grant the estate for a term of years, to take effect immediately after his decease, for the purpose of securing it:—*Held*, that the term of 100 years, created in pursuance of this power, was not concurrent with, but took priority over the term of 600 years; and that the person in whom the term of 100 years was vested might sue alone, without joining the trustee of the term of 600 years.

THE declaration stated, that, by lease, dated March, 1827, Henry Charles Duke of Beaufort, and Henry Marquis of Worcester, subject to the sanction and confirmation of Parliament, demised to George Tennant lands in Kilvey, to hold for 1000 years, at a certain rent: that G. Tennant covenanted with the Duke, and with the persons who for the time being should be seised of or entitled to the demised premises in reversion or remainder immediately expectant upon the said term, that he would pay the rent: that, by an Act passed in 1827 for confirming the lease, reciting that by certain indentures of lease and release, dated 22nd and 23rd of July, 1814, and a recovery therein referred to, being the settlement made on the marriage of the said Marquis and Georgiana Frederica Fitzroy, his first wife, the lands in question were conveyed upon trusts to take effect after the solemnisation of the then intended marriage, that is to say, subject to a rent-charge thereby provided for the said Georgiana by way of jointure, but which had since determined by her death, to the use of John Lord Burghersh and Charles Fitzroy during the term of 600 years, to be computed from the decease of the said Marquis: upon trust for raising portions for the daughters and younger sons, with remainder to the said Henry Charles Duke of Beaufort for life, with remainder to Lord Robert

Somerset and Lord Arthur Somerset during the life of the said Duke, to preserve contingent remainders, with remainder to the use of the said Marquis, with remainder to the use of the first and every other son of the said Marquis on the body of the said Georgiana to be begotten, with divers remainders over : And reciting, that it was thereby further provided, that if the said Georgiana should die in the lifetime of the Marquis, then it should be lawful for the Marquis, either before or after his marriage with any woman after the decease of the said Georgiana, to grant to the use of such woman as he should marry, for her life, any yearly rent-charge not exceeding 2000*l.*, together with such powers for recovering the same as to the Marquis should seem meet ; and also reciting the death of the said Georgiana Marchioness of Worcester, leaving two daughters ; and reciting that, in 1822, the said Marquis married Emily Frances Culling Smith, by whom he had issue one son ; and that, by a deed poll in 1824, the said Marquis granted a rent-charge of 2000*l.* to his wife, with the usual power of distress and entry ; and further reciting that the said Marquis appointed the said hereditaments to James Walter Grimstone Earl of Verulam and Lord Fitzroy Somerset : To hold to them and their executors for 100 years, upon trust for better securing the said rent-charge ; and reciting the said indenture of lease of 1827, and that it would be for the benefit of the Duke and Marquis, and of the persons claiming by virtue of the settlement, that the lease should be confirmed ; but that, by reason of the limitation in the settlement the lease could not be confirmed without the authority of Parliament : It was enacted that the lease should be confirmed as against all persons having or claiming any estate, right, title, or interest in the hereditaments comprised in the lease of March, 1827, by virtue of or under the indentures of lease and release of 1814, and the recovery therein referred to ; and that the said Duke during his life, and after his death the person who for the time being should be seised of or entitled to the said hereditaments and premises comprised in the said

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lease of March, 1827, in reversion or remainder immediately expectant upon the determination of the said term of 1000 years, might at all times during the said term of 1000 years have full power, by action, suit, or distress, or other proceeding at law or in equity or otherwise, as such person should think proper or be advised, to recover payment of the yearly rents reserved by the lease. The declaration then stated that the recitals in the Act were true; and that, in addition to the power to create a rent-charge in favour of a second wife, the settlement of 1814 empowered the said Marquis to grant and appoint the hereditaments demised by the lease of 1827 to any person for any term or number of years, to take effect immediately after the decease of the said Marquis, for the better securing the payment of the rent-charge, so as the said term should be made determinable upon the ceasing of the rent-charge: that the deed poll of 1824 was duly made and executed in pursuance of the power: that the lessee, George Tennant, entered: that the Duke Henry Charles died: that the Marquis Henry died leaving his second wife surviving him, who is now entitled to the rent-charge: that the term of 100 years was assigned to the plaintiff, and that the trusts of it are still subsisting, and the rent-charge still in force.—Breach.—Nonpayment of rent after the term of 100 years had become vested in the plaintiff.

Demurrer and joinder.

Ogle in support of the demurrer.—The demise is by Henry Charles Duke of Beaufort and Henry Marquis of Worcester, jointly. The survivor must sue, or his heirs after his death. The limitation in the settlement cannot affect the right of action upon the lease. [*Martin*, B.—The plaintiff will contend that the term for raising a rent-charge for the second wife takes priority over the term for 600 years.] There is no reason why it should take priority. The children of the former marriage are not provided for. Lord Burghersh and Mr. Fitzroy, the trustees of the term

of 600 years, should have been parties. The plaintiff should have shewn that this term was satisfied. At all events, the term of 600 years, if not prior, is concurrent. The plaintiff comes in by title paramount.

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J. Brown contra.—The lease was granted by persons who had not the entire fee. It would not have been valid without confirmation by Parliament. An Act was passed reciting the title, confirming the lease, and empowering the person who for the time being should be seised of or entitled to the reversion immediately expectant upon the lease to sue. The question then is, whether the term of 100 years created by the son under the power contained in his marriage settlement to raise a jointure for a second wife, takes priority over the term of 600 years to raise portions for the younger children of the first marriage. That is a settled point. In Sugden on Powers, Vol. 2, pp. 36, 38, 7th edit., it is said, "A power to create leases to take effect in possession will control and overreach *all* the powers and estates in the settlement" (a). "The same rule prevails when any other estate is authorised to be raised by a power, and from the nature of the interest to be raised it is to take effect in possession or next after the estate of the donee of the power. Therefore, jointures, like leases, will supersede all the estates in the settlement which would prevent the jointress from taking her jointure upon the death of her husband, which is the period at which it should arise; for powers to jointure, like powers to lease, take precedence of all the estates in the settlement, unless it be otherwise provided by the instrument creating the power."—He referred to *Sandys v. Sandys* (b), *Carter v. Carter* (c), and *Reynolds v. Meyrick* (d), there cited.

ALDERSON, B.—In this case the question is, who is the

(a) Citing *Talbot v. Tipper*,
Skin. 457; *Doe v. Thomas*, 9 B.
& C. 288.

(b) 1 P. Wms. 706.
(c) Mose. 365.
(d) 1 Eden, 48.

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proper party to sue. The Duke of Beaufort and the Marquis of Worcester, who made the lease, are both dead. I think that the person in whom the term of 100 years is vested represents them. There is another term of 600 years for raising portions for younger children. According to the authorities, a term for raising a jointure takes precedence of a term for raising portions for children. As long as the Duchess lives the present plaintiff is entitled to sue. There must be judgment for the plaintiff.

MARTIN, B.—I am of the same opinion. A lease is granted by the Duke and the Marquis of Worcester. What Mr. *Ogle* said would be true, if the demise stood alone. The person entitled to sue would be the survivor or his heirs, though the reservation of rent is to the person for the time being entitled to the reversion or remainder immediately expectant upon the term granted by the lease. At common law the right of action would not follow the limitations of the settlement. An Act of Parliament was passed confirming the lease, and enabling the person entitled to such remainder or reversion to sue. The nature of things shews that the term created under the power for securing the jointure for a second wife takes precedence of the term for raising portions for the children of the first marriage. This term is vested in the plaintiff, and he is enabled to sue by the express provision of the Act of Parliament.

BRAMWELL, B.—I am of the same opinion.

Judgment for the plaintiff.

1866.

BLYTH v. THE COMPANY OF PROPRIETORS OF THE BIRMINGHAM WATERWORKS.

Feb. 6.

THIS was an appeal by the defendants against the decision of the judge of the County Court of Birmingham. The case was tried before a jury, and a verdict found for the plaintiff for the amount claimed by the particulars. The particulars of the claim alleged, that the plaintiff sought to recover for damage sustained by the plaintiff by reason of the negligence of the defendants in not keeping their water-pipes and the apparatus connected therewith in proper order.

The case stated that the defendants were incorporated by stat. 7 Geo. 4, c. cix., for the purpose of supplying Birmingham with water.

By the 84th section of their Act it was enacted, that the company should, upon the laying down of any main-pipe or other pipe in any street, fix, at the time of laying down such pipe, a proper and sufficient fire-plug in each such street, and should deliver the key or keys of such fire-plug to the persons having the care of the engine-house in or near to the said street, and cause another key to be hung up in the watch-house in or near to the said street. By sect. 87, pipes were to be eighteen inches beneath the surface of the soil. By the 89th section, the mains were at all times to be kept charged with water. The defendants derived no profit from the maintenance of the plugs distinct from the general profits of the whole business, but such maintenance was one of the conditions under which they were permitted to exercise the privileges given by the Act. The main-pipe opposite the house of the plaintiff was more than eighteen inches below the surface. The fire-plug was constructed according to the best known system, and the materials of it were at the time of the accident sound and in good order. The apparatus connected with the fire-plug was as follows:—

A water company having observed the directions of the Act of Parliament in laying down their pipes, is not responsible for an escape of water from them not caused by their own negligence.

The fact, that their precautions proved insufficient against the effects of a winter of extreme coldness, such as no man could have foreseen, is not sufficient to render them liable for negligence.

Fire-plugs properly constructed having been inserted as safety-valves in these pipes, in pursuance of their Act:—*Semble*, per *Brameswell*, B., that the company are not liable for not removing accumulations of ice in the streets over such plugs.

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The lower part of a wooden plug was inserted in a neck, which projected above and formed part of the main. About the neck there was a bed of brickwork puddled in with clay. The plug was also inclosed in a cast iron tube, which was placed upon and fixed to the brickwork. The tube was closed at the top by a moveable iron stopper having a hole in it for the insertion of the key, by which the plug was loosened when occasion required it.

The plug did not fit tight to the tube, but room was left for it to move freely. This space was necessarily left for the purpose of easily and quickly removing the wooden plug to allow the water to flow. On the removal of the wooden plug the pressure upon the main forced the water up through the neck and cap to the surface of the street.

On the 24th of February, a large quantity of water, escaping from the neck of the main, forced its way through the ground into the plaintiff's house. The apparatus had been laid down 25 years, and had worked well during that time. The defendants' engineer stated, that the water might have forced its way through the brickwork round the neck of the main, and that the accident might have been caused by the frost, inasmuch as the expansion of the water would force up the plug out of the neck, and the stopper being encrusted with ice would not suffer the plug to ascend. One of the severest frosts on record set in on the 15th of January, 1855, and continued until after the accident in question. An incrustation of ice and snow had gathered about the stopper, and in the street all round, and also for some inches between the stopper and the plug. The ice had been observed on the surface of the ground for a considerable time before the accident. A short time after the accident, the company's turncock removed the ice from the stopper, took out the plug, and replaced it.

The judge left it to the jury to consider whether the company had used proper care to prevent the accident. He thought, that, if the defendants had taken out the ice adhering to the plug, the accident would not have happened,

and left it to the jury to say whether they ought to have removed the ice. The jury found a verdict for the plaintiff for the sum claimed.

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Field for the appellant.—There was no negligence on the part of the defendants. The plug was pushed out by the frost, which was one of the severest ever known.

The Court then called on

Kennedy for the respondent.—The company omitted to take sufficient precautions. The fire-plug is placed in the neck of the main. In ordinary cases the plug rises and lets the water out; but here there was an incrustation round the stopper, which prevented the escape of the water. This might have been easily removed. It will be found, from the result of the cases, that the company were bound to take every possible precaution. The fact of premises being fired by sparks from an engine on a railway is evidence of negligence: *Piggott v. Eastern Counties Railway Company* (a), *Aldridge v. Great Western Railway Company* (b). [*Martin, B.*—I held, in a case tried at Liverpool, in 1853, that, if locomotives are sent through the country emitting sparks, the persons doing so incur all the responsibilities of insurers: that they were liable for all the consequences (c). I invited counsel to tender a bill of exceptions to that ruling. Water is a different matter.] It is the defendants' water, therefore they are bound to see that no injury is done to any one by it. An action has been held to lie for so negligently constructing a hayrick at the extremity of the owner's land, that, by reason of its spontaneous ignition, his neighbour's house was burnt down: *Vaughan v. Men-*

(a) 3 C. B. 229.

(b) 3 M. & Gr. 515; 4 Scott, N. R., 156; 1 Dowl. N. S. 247, S. C.

(c) See *Lambert v. Bessey, T.*

Raym. 422; *Scott v. Shepherd*, 3 Wils. 403. Probably, an action of trespass might have been brought.

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love (a). [*Bramwell*, B.—In that case discussions had arisen as to the probability of fire, and the defendant was repeatedly warned of the danger, and said he would chance it.]—He referred to *Wells v. Ody (b)*. [*Alderson*, B.—Is it an accident which any man could have foreseen?] A scientific man could have foreseen it. If no eye could have seen what was going on, the case might have been different; but the company's servants could have seen, and actually did see, the ice which had collected about the plug. It is of the last importance that these plugs, which are fire plugs, should be kept by the company in working order. The accident cannot be considered as having been caused by the act of God: *Siordet v. Hall (c)*.

ALDERSON, B.—I am of opinion that there was no evidence to be left to the jury. The case turns upon the question, whether the facts proved shew that the defendants were guilty of negligence. Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done. A reasonable man would act with reference to the average circumstances of the temperature in ordinary years. The defendants had provided against such frosts as experience would have led men, acting prudently, to provide against; and they are not guilty of negligence, because their precautions proved insufficient against the effects of the extreme severity of the frost of 1855, which penetrated to a greater depth than any which ordinarily occurs south of the polar regions. Such a state of circumstances constitutes a contingency against

(a) 3 Bing. N. C. 468. (b) 1 M. & W. 452. (c) 4 Bing. 607.

which no reasonable man can provide. The result was an accident, for which the defendants cannot be held liable.

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MARTIN, B.—I think that the direction was not correct, and that there was no evidence for the jury. The defendants are not responsible, unless there was negligence on their part. To hold otherwise would be to make the company responsible as insurers.

BRAMWELL, B.—The Act of Parliament directed the defendants to lay down pipes, with plugs in them, as safety-valves, to prevent the bursting of the pipes. The plugs were properly made, and of proper material; but there was an accumulation of ice about this plug, which prevented it from acting properly. The defendants were not bound to keep the plugs clear. It appears to me that the plaintiff was under quite as much obligation to remove the ice and snow which had accumulated, as the defendants. However that may be, it appears to me that it would be monstrous to hold the defendants responsible because they did not foresee and prevent an accident, the cause of which was so obscure, that it was not discovered until many months after the accident had happened.

Verdict to be entered for the defendants.

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TAME v. THE COMPANY OF PROPRIETORS OF THE GRAND JUNCTION CANAL.

By stat. 33 Geo. 3, c. lxxx. the Grand Junction Canal Company were empowered to take tolls for the passage of manure between Braunston and Brentford. By s. 97, persons occupying lands through which the canal passed might carry manure without payment. By stat. 34 Geo. 3, c. xxiv., for making a cut to Buckingham, the powers and authorities mentioned in the former Act were to be exercised by the company and by the owners of lands on the new cut, as if re-enacted, and the like exemptions were to be allowed. By 35 Geo. 3, c. xliii., reciting the first-mentioned Act, the company were empowered to make a cut to Paddington; and the several powers, authorities, matters, and things in the recited Act contained, except the rates, were to be used and exercised by the company, and applied for making the cut and for ascertaining tolls, and in all respects as if re-enacted, and as if the cut had been part of the works authorised to be made by the first Act.

THIS action was brought to recover back money paid for tolls for the passage of manure along the Paddington Canal. After writ issued, by the consent of the parties and by the order of *Plutt*, B., the following case was stated for the opinion of the Court.

By 33 Geo. 3, c. lxxx, the Company of Proprietors of the Grand Junction Canal were incorporated for the purpose of making a canal from Braunston, in Northamptonshire, to the Thames, at Brentford. By s. 67, they were empowered to take toll for manure at one halfpenny per ton per mile, and in case of non-payment to distrain. Section 97 provided, that any person occupying any lands through which the canal should pass, might use boats for the conveyance of dung, marl, soil, or compost upon the canal, to or from his land, for the improvement of it, without paying any rate.

By 34 Geo. 3, c. xxiv., reciting the last-mentioned Act, the Company were empowered to make cuts from Buckingham and Aylesbury to communicate with the said canal; and it was thereby enacted, that the several powers, authorities, provisions, rates of tonnage &c. in the former Act contained, should be exercised by the Company for the several purposes therein mentioned; and should also be used and

By stat. 35 Geo. 3, c. lxxxv., for making a cut from Watford to St. Alban's, reciting the before-mentioned Acts, the powers granted thereby were to be exercised by the company and by the owners of lands as if re-enacted, and the like exemptions were allowed: *Held*, first, that, on the construction of the 35 Geo. 3, c. xliii., persons occupying lands on the Paddington cut could not carry manure on the canal free from toll: Secondly, that the provisions of the several public local Acts with respect to the tolls on different cuts, parts of the same canal, might be compared in order to ascertain the meaning of a clause in the Paddington Act, alleged to create exemptions from toll upon the Paddington cut.

exercised by the owners of lands adjoining the said cuts in the like manner as if the same had been re-enacted; and the like exemptions were to be allowed.

By 35 Geo. 3, c. xliii., reciting the first-mentioned Act and certain other Acts, the Company were empowered to make a cut to Paddington; and it was enacted, that the several powers, authorities, provisions, matters, and things in the recited Acts contained, except the rates of tonnage, and, so far as the same were applicable, or the nature of the respective cases would admit, should be used and exercised by the said Company of proprietors, and should be applied and enforced for making the said cut, and for ascertaining the tolls, &c.; and in all other respects in like manner, and as fully and effectually to all intents and purposes, as if the said several powers, authorities, provisions, matters, and things had been re-enacted in the body of that Act, and as if the cut had been part of the works by the said Acts authorised to be made.

By sect. 8, the Company were authorised to take one penny per ton per mile for manure.

By stat. 35 Geo. 3, c. lxxxv., for making a cut from Watford to St. Alban's, reciting the before-mentioned Acts, it was enacted, that the powers &c. therein contained should be exercised by the Company of proprietors, and *also by the owners of land adjoining the said cut*, as if they had been re-enacted in the body of that Act; and the like exemptions were allowed.

The plaintiff was the owner and occupier of land at Aperton, through which the Paddington cut passes. He was in the habit of bringing manure from his own wharf along the cut in his own barges, for the improvement of his land. In order to prevent the manure from being distrained on, he paid the tolls under protest.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover back the monies so paid by him. If the Court shall be of that opinion, judgment is to

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be entered for the plaintiff for the amount so paid; if the Court shall be of a contrary opinion, judgment is to be entered for the defendant.

Watson (with whom was *Phipson*) for the plaintiff.—The landowners on the new cut have the same power of putting boats on the canal and carrying manure, under stat. 35 Geo. 3, c. xliii., as under the first Act. All the powers, authorities, provisions, matters, and things in the first Act are to exist in the Paddington Act, with one exception. That exception refers only to the amount of the rates of tonnage. The liberty to carry manure is a power, and not an exemption. It is not put in the Act of Parliament as an exemption; it is not said that the landowners shall be exempt from tolls, but that they shall have power to enter and carry manure on the canal without payment. The Company seek to claim a toll, and therefore they ought to shew that the statute gives it to them in unequivocal terms. If there is an ambiguity, the construction shall be that which is least favourable to the Company: *Hall v. Grantham Canal Navigation Company* (a), *Stourbridge Canal Company v. Wheeley* (b). At most, the clause is ambiguous. A series of public Acts may be read together as part of a system, but the same rule does not apply to local Acts. [*Martin*, B.—I should concede that as a general proposition. But in an Act in the same session you find the language different; there was probably some reason for it. The Paddington Act relates to a cut within ten miles of London, which was probably expensive to make, and on which manure would be likely to be carried as merchandise.]

Mellish for the defendants.—The clause is copied from the previous Act. Every word is omitted which would apply to the exemption. The right to carry manure may be a power or authority; but it is a power to be exercised

(a) 13 M. & W. 114. Affirmed *pany v. Hall*, 14 M. & W. 880.
 in error, *Grantham Canal Com-* (b) 2 B. & Ad. 792.

not by the Company, but by the owners of adjoining lands. The exception of rates of tonnage excepts the exemptions. As to the cases that have been cited with respect to the construction being against the party obtaining an Act, there is a distinction between that class of cases and those where an exemption is sought to be established. [*Bramwell*, B.—It is impossible to deny that those cases are law; but I think that rules of this sort, such as favouring the heir and the like, are temptations to misconstruction.]

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Watson in reply.—The power of the Company to take toll is entire; the exemption is a qualification of the power. The Act must be construed as if stat. 35 Geo. 3, c. lxxxv., had never been passed. The several Acts are prepared by different sets of parties interested. Each set of land-owners will require the insertion of such clauses as they think requisite for their interests, without reference to what others have required in other instances (a).

MARTIN, B.—I am of opinion that the defendants are entitled to judgment. The question depends on the 35 Geo. 3, c. xliii. If that Act stood alone, I should pronounce the same judgment that I do now. I am content that the exemption should be called a power; but even so, Mr. *Watson's* argument fails. The statute enacts, that the several powers &c., so far as they are applicable, shall be used and exercised by the Company in all respects as fully as if they were re-enacted. That refers to powers belonging to the Company, to be exercised by them. The right to carry manure free is not such a power as is referred to in this clause. The 8th section is general: it gives tolls on all manure, without exception. But when I examine the provisions of the 34 Geo. 3, c. xxiv. and 35 Geo. 3, c. lxxxv.,

(a) See per *Truro*, C., *Ex parte Eton College*, *In re London and Birmingham Railway Company's Acts*, 1833, 1846, 20 L. J., N. S., (Chauc.) 8; *Trustees of the Bir-*
kenhead Docks v. The Birkenhead Dock Company and Others, 23 L. J. (Chanc.) 457; 4 De G. Mac. & G. 732, S. C.

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I find an express exemption wholly omitted in the 35 Geo. 3, c. xliii., and the alteration was no doubt intentional.

BRAMWELL, B.—I am of the same opinion. The Act declares lime and other manure subject to toll. Mr. *Watson* attempted to shew that the exemptions in the former Act were incorporated. He said, that the power to take tolls and the exemption must be read together, as a qualified power in the Company. The argument is ingenious, and would be sound if the power was subject to a condition. I think that those powers only are incorporated which are to be exercised by the Company. If that opinion required justification, it would be afforded by a comparison of the Buckingham Act, which expressly provides that the several powers shall be used by the owners of lands as if re-enacted.

Judgment for defendants.

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COLLINS v. THE BRISTOL AND EXETER RAILWAY COMPANY.

The plaintiff delivered, at the station of the Great Western Railway Company at Bath, a van-load of furniture, to be conveyed to Torquay. He

signed a receipt note, which was headed,—“Bath Station.—To the Great Western Railway Company.—Received the under-mentioned goods, on the conditions stated on the other side, to be sent to Torquay station, and delivered to the plaintiff or his agent.” One condition was, that the Company would not be answerable for loss or damage by fire. Another condition stated, that the Company would not be responsible for loss or damage to goods beyond the limits of their railway. The van was placed on a truck and conveyed to Bristol, where the Great Western line ends and the defendants’ (the Bristol and Exeter) line begins. The same truck and guard proceeded with the van to Exeter, where the defendants’ line ends, and is joined by the line of the South Devon Company, which runs to Torquay. Whilst the van and furniture were at the defendants’ station at Exeter, they were accidentally destroyed by fire:—*Held*, that this was one contract with the Great Western Railway Company for the conveyance of the van and furniture from Bristol to Torquay, subject to the conditions in the receipt note; and that, consequently, none of the companies were responsible for the loss.

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veyed by the defendants to a certain place, to wit, Torquay, and there to be safely and securely delivered for the plaintiff, for reasonable reward to the defendants in that behalf. Yet the defendants, not regarding their duty as such common carriers, did not nor would safely and securely carry or convey the said van and the said goods to the place aforesaid, nor there safely or securely deliver the same for the plaintiff. (There were other counts not material to the present question).

Plea (inter alia)—That, before the said goods were delivered to the defendants, it was agreed between the plaintiff and the Great Western Railway Company, as the agents of the defendants, that the reward to be paid to the defendants for the carriage, conveyance, and delivery of the said van and goods should be a less sum than the reasonable reward payable to the defendants for safely and securely carrying and conveying, and safely and securely delivering the same; and that the plaintiff should pay and the defendants should accept such less sum upon and in consideration of the special terms (amongst other things) that the defendants should not be answerable for the loss of or damage to any goods arising by fire; and that the defendants were prevented from safely and securely carrying and conveying, and safely and securely delivering, the said van and goods by reason of damage to the same occasioned by fire.

Replication.—The plaintiff takes issue on the defendants' plea.

At the trial, before *Williams, J.*, at the last Somerset Assizes, it appeared that in August, 1853, the plaintiff, who was a carrier residing at Bath, delivered at the station of the Great Western Railway Company at Bath, a van-load of furniture, to be conveyed to Torquay in Devonshire, and signed a receipt note, which was headed as follows:—

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" Bath Station, 7th August, 1853.

To the Great Western Railway Company.

" Received the under-mentioned goods on the conditions stated on the other side.

" To be sent to Torquay Station and delivered to R. C. Collins, consignee, or his agent."

(Then followed a description of the goods, their weight, &c.)

On the back of the receipt note were the following (among other) conditions.

" CONDITIONS AND EXCEPTIONS.

" THE GREAT WESTERN RAILWAY COMPANY—

" GIVE PUBLIC NOTICE. 4thly. That they will not be answerable for the loss of or for damage to any goods arising from fire."

" 10thly. That all goods addressed to consignees resident beyond the limits of the Company's local regulation for delivery of goods from the different stations on the railway, and respecting which no directions to the contrary shall have been received previous to arrival at the station, will be forwarded to their destination by public carrier or otherwise as opportunity may offer; or they will, at the discretion of the Company by whom they may have been received, be suffered to remain on the Company's premises, or be placed in shed or warehouse, if there be convenience for receiving the same, pending communication with the consignees, at the risk of the owners, as referred to in clause No. 4. That the charges of such carrier will be added to those of the Company, and the delivery of the goods by the Company will be considered as completed, and the responsibility of the Company will be considered to have ceased, when the carriers shall have received the goods for further conveyance. And the Company hereby give notice that any money which may be received by them, as payments for the conveyance of goods by other carriers beyond their said limits, will be received only for the convenience of the consignors, for the purpose of being paid to such other carriers, and will not be received as a charge made by the Company upon the goods in the capacity of carriers beyond the extent of their own railway: and the Company hereby further give notice, that they will not be responsible for any loss, damage, or detention that may happen to goods so sent by them, if such loss, damage, or detention occur beyond their said limits."

" 13thly. That the above conditions apply to all goods received by the above-named Company at all or any of their offices and warehouses wherever situated. And as to all goods entrusted to them, they will only agree to carry them subject to the above conditions, and to all other the rules and regulations of the said Company."

The van and goods were placed on a truck and forwarded by the Great Western Railway Company to Bristol, which is the terminus of their line. The van and goods were then handed over by that Railway Company to the Bristol and Exeter Railway Company (the present defendants), whose line joins that of the Great Western Railway Company at Bristol, and terminates at Exeter, at which place it is joined by the line of the South Devon Railway Company, which line runs on to Torquay and other places. The van and goods, after being handed over to the Bristol and Exeter Railway Company, were carried by that Company to Exeter in the same truck and attended by a guard in the service of the Great Western Railway Company. They were placed for the night upon a siding in an open shed at the station of the Bristol and Exeter Railway Company, where they were destroyed by fire. It was proved that it was the custom of the defendants to receive traffic, as the next carriers, from the Great Western Railway Company, and to forward it, receiving for so doing a mileage proportion for the carriage of the same.

It was objected, on the part of the defendants, that they were not liable, inasmuch as they contracted to carry the goods on the special terms mentioned in the above conditions. It was contended, on the part of the plaintiff, that the conditions applied to the Great Western Railway Company only. The learned Judge left it to the jury to say whether there was negligence on the part of the defendants; and the jury found that there was not: whereupon, his Lordship directed a verdict for the plaintiff, reserving leave to the defendants to move to enter a nonsuit.

Kinglake, Serjt., in the following Term, obtained a rule nisi accordingly; against which

Montague Smith and *T. W. Saunders*, shewed cause, in Hilary Term (Jan. 28th).—The defendants are liable as

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common carriers. There was a distinct contract with each of the three companies to carry on their line of railway. The special contract was with the Great Western Railway Company only, and that terminated on the arrival of the goods at Bristol. The receipt note, indeed, said "that the goods are to be sent to Torquay Station," but that is merely a statement of the place of their ultimate destination. The 4th condition provides for non-liability in case of loss or damage to goods by fire; but the defendants cannot avail themselves of that stipulation, for it applies solely to the contract with the Great Western Company. The 10th condition is the same as that in the case of *Fowles v. The Great Western Railway Company (a)*, and by it the responsibility of that company ceased when they handed over the goods to the defendants. For anything that appears, the defendants may have contracted to carry the goods under totally different conditions. In the absence of any evidence as to the terms, they are subject to the ordinary responsibility of common carriers.

Kinglake, Serjt., in support of the rule.—This is a contract with the Great Western Railway Company to carry from Bath to Torquay, subject to the conditions referred to; and the two other companies are their agents for that purpose. The receipt note mentions the station from which the goods were to be sent, and the station to which they were to be carried. *Fowles v. The Great Western Railway Company (a)* is an express authority that the stations mentioned in the contract are the termini to which the conditions apply. [*Alderson*, B.—Is that view consistent with the 10th condition, by which the Company stipulate that they will not be liable beyond the limits of their own railway?] "Beyond the limits" means "beyond the termini;" that is, when the goods are handed over to a carrier for delivery at

(a) 7 Exch. 699.

the house of the consignee. The whole line between the two termini is the railway of the Company for the purposes of this contract. Suppose there had been no conditions, would not this have been the case of an ordinary contract with the Great Western Railway Company, as common carriers, to carry the whole distance from Bath to Torquay? That Company undertook to carry not only on their own line, but also on the line of the two other companies. They made one entire charge for the whole distance. *Scothorn v. The South Staffordshire Railway Company* (a), and *Muschamp v. The Lancaster Railway Company* (b) shew that the company with whom the contract is made is responsible for the loss of the goods, notwithstanding it occurred on the line of another company. Where a carrier enters into a sub-contract with other parties in respect of goods which he has undertaken to carry, he makes the servants of the latter his agents for that purpose: *Macku v. The South Western Railway Company* (c). This was one contract made with the Great Western Company alone, and consequently the defendants are not liable.

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Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B.—This was a rule to enter a nonsuit in a case tried before my Brother *Williams* at the last Somerset Assizes. The facts were these.—The plaintiff delivered at the station of the Great Western Railway Company at Bath, a van containing furniture, to be conveyed to Torquay, in Devonshire. The ordinary receipt note of the Company was handed to the plaintiff to sign, and there was printed on the back of it the conditions upon which goods were carried by the Great Western Company, one of which was, that the Company were not to be responsible for fire, and

(a) 8 Exch. 341.

(b) 8 M. & W. 421.

(c) 2 Exch. 415.

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another (the 10th), for the protection of that company from liability beyond the limits of their own line. The receipt note upon the face of it was headed "Bath Station," and directed to "The Great Western Railway Company," and proceeded thus: "Received the under-mentioned goods from the plaintiff, to be conveyed by the Great Western Railway Company from Bath to Torquay, under the conditions stated on the other side." Then there followed a description of the goods, and the document was signed by the plaintiff. The van was placed upon a truck, and was conveyed to Bristol, where the Great Western line ends and the defendants' line begins. The same truck and same guard proceeded with the van to Exeter, where the defendants' line ends; and whilst there, the truck upon which the van was loaded, was for convenience put off the main line upon a siding. It then from some unknown cause took fire and was burned, and the jury found that the cause of the fire was unknown, and that no blame was attributable to any one in respect of it. The line from Exeter to Torquay is a third line, called the South Devon. A verdict was entered for the plaintiff, and leave given to enter a nonsuit. A rule for that purpose was obtained, and cause has been shewn against it.

It was argued on behalf of the plaintiff, that there were three different contracts for the carriage of the goods: one with the Great Western Railway Company, another with the Bristol and Exeter Company, and a third to be made with the South Devon Company; that the contract with the Great Western Railway Company was completed at Bristol, and that there the condition as to non-responsibility from fire terminated; and that the Bristol and Exeter Company thenceforward became common carriers under the ordinary liability, which of course includes loss by fire; and it was stated that it had been agreed at the trial that the defendants, the Bristol and Exeter Company, were to be considered as the proper parties to be made defendants.

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On behalf of the defendants it was said, that it was correct that an arrangement had been come to, that no objection should be made that the defendants were not rightly sued; but that it never was intended that any defence, which was available under the circumstances of the transaction should not be made use of, but merely that, if any of the companies were liable, the defendants might be deemed the proper parties to be sued for the purpose of this action; and it is obvious from the transaction itself that this must be so; and the question comes to this, whether or not any of the companies are responsible for the loss? We have heard the case argued, and are of opinion that none of them are. We clearly think that the contract for the conveyance of the van and furniture was *one* contract, and made with the Great Western Railway Company alone. They contracted in express terms upon the face of the receipt note to carry the goods from Bath to Torquay; and if anything is contained in the 10th condition repugnant to this contract, it could not affect it. We therefore think that there was a contract by the Great Western Railway Company to carry the goods the whole way to Torquay, and of course the condition as to fire extends to protect them against loss from such cause during the entire journey. This is in exact conformity with the judgment of this Court in *Muschamp v. The Lancaster Railway Company (a)*, which has been frequently confirmed and acted upon by all the Courts at Westminster Hall.

We therefore think that no action is maintainable against any of the companies, and that a nonsuit ought to be entered.

Rule absolute.

(a) 8 M. & W. 421.

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JAMES HUTCHINSON *v.* GILLESPIE and Another.

Debt will lie on a final order of the Judicial Committee of the Privy Council for payment of costs, notwithstanding the order is made in a proceeding collateral to the original suit; and that suit is still undetermined.

THE declaration stated, that, on the 9th July, 1825, a writ, called a writ of attachment or saisie arrêt, was sued out of the Court of King's Bench at Montreal, in the province of Lower Canada, by the now defendants, the plaintiffs in the said Court of King's Bench, against one J. Spragg and W. Hutchinson, the defendants in the same Court; by which writ the sheriff of the district of Montreal, amongst other things, was commanded to attach and seize all such monies, credits, and effects that he might find in the hands, possession, or power of the several persons in that writ particularly named, and amongst others of J. Lambe, S. Spragg, and W. Spragg, belonging to or due to J. Spragg and W. Hutchinson, or to either of them, or so much thereof as might be sufficient to answer the demand of the now defendants; and the sheriff was thereby further commanded that he should summon J. Lambe, S. Spragg, and W. Spragg, and the several other persons in the writ named, to appear before the justices of the said Court of King's Bench at the day and place therein mentioned, to declare upon oath what goods, credits, monies, or effects, they, or any or either of them, might have in their or his hands, possession, custody, or power, of or belonging to the said J. Spragg and W. Hutchinson, or what sum or sums of money they or either of them then owed, or thereafter should or might owe, in any manner whatsoever, to J. Spragg and W. Hutchinson, or either of them, to abide the further order of the Court thereon; and the sheriff was further commanded to attach and seize all goods, monies, credits, and effects in the hands of J. Spragg and W. Hutchinson, or in the hands of either of them, and that the sheriff should summon them to appear to hear the attachments declared good and valid; that under the said writ

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the sheriff caused to be attached and seized, amongst other things, in the hands, possession, or power of J. Lambe, S. Spragg, and W. Spragg, and of J. Spragg and W. Hutchinson, divers goods, monies, credits, and effects, to very large amounts in value: that J. Lambe, after the execution of the writ, made his declaration on oath according to the exigency thereof, and afterwards, namely, on the 17th February, 1826, made and filed his declaration on oath de novo, and thereby deposed, amongst other things, that, on the 21st June, 1825, he received from J. Spragg and W. Hutchinson, as belonging to and to be sold for the account and risk of W. Hutchinson and of the now plaintiff, divers goods, wares, and merchandises, amounting to the net sum of 5182*l.* 14*s.* 11*d.*: that from the time of the receipt of the goods up to the 14th February, 1826, he, J. Lambe, made sales thereof, the net proceeds of which amounted, errors excepted, to the sum of 3450*l.* 15*s.* 3½*d.*, and that the invoice value of the remainder of the goods then in his possession amounted to 1917*l.* 15*s.* 6*d.*: that S. Spragg and W. Spragg also filed their declaration on oath to the writ; and that both the declarations on oath of J. Lambe, and in particular his declaration de novo, were contested by the now defendants in the said Court of King's Bench at Montreal: that afterwards, on the 17th April, 1826, the now plaintiff filed in the said court his *petition of intervention* in the said cause, by which petition, after stating, amongst other things, that, from the year 1812 up to the 1st January, 1825, the now plaintiff and the said W. Hutchinson were copartners, and while they were such consigned to J. Spragg and W. Hutchinson divers goods and merchandises to a large amount, to be sold by them on the account and for the profit of them, W. Hutchinson and the now plaintiff; and further stating that the partnership ceased on the 1st of January, 1825; and that, certain differences having arisen between them, W. Hutchinson and the now plaintiff, all differences and disputes between them had

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been referred to the award of certain arbitrators in the petition named, who by their award, dated the 30th of January, 1826, had awarded and adjudged, that, on the 1st of January, 1826, a balance of 18,887*l.* 16*s.* 10*d.* was due by the firm of W. and J. Hutchinson, and by W. Hutchinson, to the now plaintiff; and that the estate belonging to the copartnership, both real and immoveable, personal and moveable, goods, wares, merchandises, and effects in the possession of W. Hutchinson and J. Lambe, and debts due to the copartnership, were of the value of 20,140*l.* 6*s.* 2*d.*; and further stating, that, on the 30th January, 1826, by deed of assignment made by W. Hutchinson to the now plaintiff, W. Hutchinson did grant, assign, and set over unto the now plaintiff, amongst other things, all his right, title, property, and interest whatsoever in all and singular the goods, wares, merchandises, and debts mentioned in the award, &c., by means whereof the now plaintiff was the true and sole proprietor of those goods, wares, and merchandises; and further stating, that the goods in such petition particularly mentioned were part of the goods consigned by W. Hutchinson and the now plaintiff to J. Spragg and W. Hutchinson, and which remained unsold on the 1st of January, 1825, and were also part of the same goods as were mentioned in the award and also in the deed of assignment, and whereof the share and interest of W. Hutchinson was assigned to the now plaintiff, which goods had been seized in the hands and possession of J. Lambe under and by virtue of the writ of attachment or saisie arrêt, &c., as belonging to J. Spragg and W. Hutchinson; and further stating, that the goods therein next particularly stated were part of the goods consigned by W. Hutchinson and the now plaintiff to J. Spragg and W. Hutchinson, and remained unsold on the 1st January, 1825, and were also part of the goods mentioned in the award and deed of assignment, and whereof the share and interest of W. Hutchinson was assigned to the now plaintiff, which last-

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mentioned goods had been seized in the hands and possession of J. Spragg and W. Hutchinson, by virtue of the writ of attachment, as belonging to J. Spragg and W. Hutchinson; the now plaintiff, by his said petition, prayed the said Court of King's Bench that he might be permitted to *intervene* in the said cause and become a party thereto; and that he might be declared the true and lawful owner and proprietor of the goods, wares, and merchandises thereinbefore mentioned and described, and seized and attached, and that thereupon such seizure and attachment might be set aside and declared null and void and of no effect: that afterwards in the said Court of King's Bench, the now defendants filed their answer and plea to the petition of intervention, and such proceedings were thereupon had that it was considered and adjudged by the said court that the *saisie arrêt* or attachment should be and the same was thereby declared good and valid; and the court, considering that the goods, wares, merchandises, and effects attached and seized in the hands of the defendants in the said court and of J. Spragg, also the monies, goods, and effects attached and seized in the hands of J. Lambe, S. Spragg, and W. Spragg, were at the time of making the attachment, and then were, the property of the now plaintiff, that is to say, certain goods therein specified in the hands of the defendants, the sum of 3450*l.* 15*s.* 3¼*d.* being the amount of the sales of part of the said goods, wares, and merchandises by J. Lambe received, and being the property of the now plaintiff, also the sum of 236*l.* 10*s.* 6*d.* declared by S. Spragg and W. Spragg to have been received by them on account of the now plaintiff; it was therefore ordered and adjudged that the goods, wares, and merchandises so attached and seized in the hands of the defendants in the said court and of J. Spragg should be delivered up to the now plaintiff, and J. Lambe should pay over to the now plaintiff the said sum of 3450*l.* 15*s.* 3¼*d.*, and also should

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restore and deliver up to him the remainder of the goods, wares, and merchandises so by him received, and which still remained in his possession as unsold, as stated in the declaration made by him in the said cause on the 17th February, 1826; and in default thereof it was adjudged that J. Lambe should pay to the now plaintiff the said sum of 1917*l.* 15*s.* 6*d.*, the invoice value of the goods so remaining unsold as aforesaid; and that S. Spragg and W. Spragg should pay over to the now plaintiff the said sum of 236*l.* 10*s.* 6*d.*.—The declaration then stated that the now defendants appealed from this judgment to the Provincial Court of Appeals at Quebec, in the said province, which, on the 30th July, 1835, reversed the judgment, (except only so much of it as adjudged that the intervention made and filed of two other persons should be dismissed, each party paying his own costs), and adjudged that the seizure and attachment under the writ of *saisie arrêt* of the goods, wares, and merchandises, monies, debts, and effects in the hands of J. Spragg and W. Hutchinson as copartners, and of J. Spragg individually, of J. Lambe, S. Spragg, and W. Spragg, should be, and the said *saisie* and attachment was thereby declared to be, good and valid; and that J. Spragg and W. Hutchinson as co-partners, and J. Spragg individually, J. Lambe and S. Spragg, severally and respectively, should pay unto the prothonotaries of the Court of King's Bench all the debts and sums of money so seized and attached in their hands respectively, there to remain, subject to such certificate of distribution thereof as should be made by the said court, and should deliver up to the prothonotaries all the goods, wares, merchandises, and effects so seized &c., in their hands respectively, there and in like manner to remain subject to the judgment or order of that court, and that the record should be remitted to the said Court of King's Bench, reserving to the appellants and to the creditors of the co-partnership of Spragg and

Hutchinson generally their recourse against the now plaintiff, to compel him by all lawful ways and means to account for and restore to the common funds of the insolvent estate of J. Spragg and W. Hutchinson the seventy-five promissory notes payable to Spragg and Hutchinson, which came to his hands and possession &c., or the proceeds thereof, subject respectively to the order of the said Court of King's Bench.—The declaration then stated, that the now plaintiff appealed from the said judgment to King William IV. in his Privy Council, who, by order of the 15th June, 1836, referred it to the Judicial Committee, which, by order of the 16th February, 1838, ordered and declared that the goods claimed by the now plaintiff were, at the time of the seizure under the attachment, the property of the now plaintiff and W. Hutchinson, and that the now plaintiff was entitled to the same notwithstanding any possession or reputed ownership of J. Spragg and W. Hutchinson, but that the now plaintiff was entitled only subject to the right which the respondents had acquired by virtue of their process of attachment, which interest was declared to be one moiety thereof, subject to the partnership debts and engagements of W. Hutchinson and the now plaintiff, and to the account between W. Hutchinson and the now plaintiff relating to partnership transactions; and the Judicial Committee, by virtue of the powers vested in them by the 3 & 4 Will. 4, c. 41, s. 17, referred to W. F. C., barrister-at-law, who should have the same power for that purpose as a Master in Chancery, to take an account of the partnership credits, debts, and engagements in Leeds, as well as in Canada or elsewhere, and to ascertain whether W. Hutchinson had at the time of the seizure any and what interest in those goods after taking the said account; and did further direct, by consent of the parties, that the said W. F. C. should have power, if necessary, to appoint another person in Canada to take the account

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there, and report to him; also that W. F. C. should inquire and report whether the seventy-five promissory notes which had come into the possession of the now plaintiff were, at the time of the execution of the attachment, the property of J. Spragg and W. Hutchinson, or of W. Hutchinson and the now plaintiff, or of the now plaintiff, as being given for the amount of the proceeds of the sale of their or his goods or otherwise: that, in obedience to the said order, W. F. C. inquired into the matters referred to him, and on the 25th May, 1850, made his report to the Judicial Committee, wherein he stated, among other things, that W. Hutchinson had not, at the time of the seizure under the said process of attachment, after taking the account directed, any interest in the goods so seized; and that the respondents did not acquire, and had not acquired by virtue of their process of attachment, any interest in the goods so seized; and that, at the time of the seizure, the seventy-five promissory notes were the property of W. Hutchinson and the now plaintiff.—The declaration then stated, that the Judicial Committee approved of this report, and reported to the Queen their opinion that the attachment issued against the goods and notes by the respondents ought to be discharged, and the said goods and notes, and any monies in the hands or power of the respondents realised or received therefrom ought to be delivered to the now plaintiff, and the costs paid by him to them under the sentence pronounced by the Court of Appeals at Quebec ought to be repaid, and any security for those costs given by him ought to be cancelled; and that the sentence of the Court of Appeals ought to be varied accordingly; “and in case the Queen should approve of their report and order as therein recommended, then their Lordships did *direct that there should be paid by the respondents to the plaintiff the sum of 1090*l.* 18*s.* 4*d.* for the costs of the proceedings under the reference to W. F. C.*”—The declaration then stated, that the Queen,

with the advice of the Privy Council, approved of this report, "and ordered and declared that the attachment against the goods and notes ought to be discharged, and that those goods and notes, and any monies in the hands or power of the respondents realised therefrom, ought to be delivered to the now plaintiff, the costs paid by him to the respondents &c. repaid to him, and any securities for the same given up, and the sentence of the Court of Appeals varied accordingly; and that the said sum of 1090*l.* 18*s.* 4*d.* should be paid by the respondents to the plaintiff for costs of the proceedings under the reference."—Averments: notice to the defendants of the report of the Judicial Committee, and the approbation and confirmation thereof by the Queen; that the defendants were requested to pay the sum of 1090*l.* 18*s.* 4*d.*; that the plaintiff had performed all which was requisite to entitle him to be paid the said sum, and that a reasonable time for that purpose had elapsed.—Breach, non-payment.

Demurrer and joinder therein.

Bovill (*Bullar* with him), in support of the demurrer.—This action is not maintainable. The 3 & 4 Will. 4, c. 41, provides for the better administration of justice in the Privy Council. By section 15 (*a*), the costs of any appeal shall be paid by such party, and in such manner as the *Committee* shall direct: therefore, the Queen in Council has no power to award costs. The 6 & 7 Vict. c. 38, makes further regulations for facilitating the hearing of appeals by the Judicial Com-

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(*a*) Enacts: "That the costs incurred in the prosecution of any appeal or matter referred to the said Judicial Committee, and of such issues as the same committee shall under this Act direct, shall be paid by such party or parties, person or persons, and

be taxed by the aforesaid registrar, or such other person or persons to be appointed by his Majesty in Council or the said Judicial Committee, and in such manner as the said committee shall direct."

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mittee of the Privy Council. The 12th section (a) of that Act also directs, that the costs shall be paid by such party as the Judicial Committee shall order. The 16th section (b) of the 3 & 4 Will. 4, c. 41, requires that the orders or decrees of the Queen in Council, not of the Judicial Committee, shall be enrolled. By section 21 (c), the orders or de-

(a) Declares and enacts: "That as well the costs of defending any decree or sentence appealed from as of prosecuting any appeal, or in any manner intervening in any cause of appeal, and the costs on either side or of any party in the Court below, and the costs of opposing any matter which shall be referred to the said Judicial Committee, and the costs of all such issues as shall be tried by direction of the said Judicial Committee respecting any such appeal or matter, shall be paid by such party or parties, person or persons, as the said Judicial Committee shall order, and that such costs shall be taxed as in and by the said Act for the better administration of justice in the Privy Council is directed respecting the costs of prosecuting any appeal or matter referred by her Majesty under the authority of the said Act, save the costs arising out of any ecclesiastical or maritime cause of appeal, which shall be taxed by the registrar hereinafter named, or his assistant registrar."

(b) Enacts: "That the orders or decrees of his Majesty in Council made, in pursuance of any recommendation of the said Judicial Committee, in any matter of appeal from the judgment or order of any court or judge,

shall be enrolled, for safe custody, in such manner, and the same may be inspected and copies thereof taken under such regulations, as his Majesty in Council shall direct."

(c) Enacts: "That the order or decree of his Majesty in Council on any appeal from the order, sentence, or decree of any court of justice in the East Indies, or of any colony, plantation, or other his Majesty's dominions abroad, shall be carried into effect in such manner, and subject to such limitations and conditions as his Majesty in Council shall, on the recommendation of the said Judicial Committee, direct: and it shall be lawful for his Majesty in Council, on such recommendation, by order to direct that such court of justice shall carry the same into effect accordingly, and thereupon such court of justice shall have the same powers of carrying into effect and enforcing such order or decree as are possessed by or are hereby given to his Majesty in Council: Provided always, that nothing in this Act contained shall impeach or abridge the powers, jurisdiction, or authority of his Majesty's Privy Council as heretofore exercised by such council, or in anywise alter the constitution or duties of the said

crees of the Queen in Council on any appeal from the colonies, shall be carried into effect in such manner as her Majesty in Council shall, on the recommendation of the Judicial Committee, direct. By section 28 (a), the Judicial Committee have the same power of enforcing judgments, decrees, and orders as are exercised by the Courts of Chancery or Queen's Bench. Therefore, the Judicial Committee of the Privy Council is a Court of superior jurisdiction, having power to enforce its own decrees. Assuming, then, that the Privy Council is in the same position as the Court of Chancery, *Carpenter v. Thornton* (b) is an express authority that no action at law can be maintained upon a decree of a Court of equity for costs. But if this be treated as an order of a Court of law, it is a mere interlocutory order. *Hookpayton v. Bussell* (c) decided that no action will lie upon an undertaking contained in a Judge's order, though the order be made by consent, and the undertaking be founded on a good consideration. Neither will an action lie

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Privy Council, except so far as the same are expressly altered by this Act, and for the purposes aforesaid."

(a) Enacts: "That the said Judicial Committee shall have and enjoy in all respects such and the same power of punishing contempts and of compelling appearances, and that his Majesty in Council shall have and enjoy in all respects such and the same powers of enforcing judgments, decrees, and orders, as are now exercised by the High Court of Chancery or the Court of King's Bench, (and both *in personam* and *in rem*), or as are given to any court ecclesiastical by an Act of Parliament passed in a session of Parliament of the second and third years of the reign of his

present Majesty, intituled 'An Act for enforcing the process upon contempts in the Courts Ecclesiastical of England and Ireland:' and that all such powers as are given to Courts Ecclesiastical, if of punishing contempts or of compelling appearances, shall be exercised by the said Judicial Committee, and if of enforcing decrees and orders shall be exercised by his Majesty in Council, in such and the same manner as the powers in and by such Act of Parliament given, and shall be of as much force and effect as if the same had been thereby expressly given to the said Committee or to his Majesty in Council."

(b) 3 B. & Ald. 52.

(c) 10 Exch. 24.

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on the Master's allocatur for costs: *Fry v. Malcolm* (a). This case falls within the principle of the decision in *Berkeley v. Elderkin* (b), where it was held that an action could not be maintained on the judgment of a county court, since it was apparent that the legislature intended to confine the remedies on such judgments to those specifically provided by the County Court Acts. That decision was adopted by this Court in *Austin v. Mills* (c). *Patrick v. Shedden* (d) is an authority that no action will lie on a mere interlocutory decree for payment of costs. The principle on which it has been held that debt will lie on a decree of a foreign court of equity is, that the decree creates a duty which the foreign court cannot enforce in this country: *Henley v. Soper* (e), *Russell v. Smyth* (f). The Privy Council has power, under the 28th section of the 3 & 4 Will. 4, c. 41, to enforce its orders either by attachment or by writ of execution. There being, therefore, a specific remedy provided by the statute, this action cannot be maintained.—He also argued, that, by the 17th section of the 3 & 4 Will. 4, c. 41, the Judicial Committee of the Privy Council had no power to refer matters to any other person than the registrar.

Hugh Hill (*Unthank* with him) contra.—The action will lie. In Com. Dig. tit. "Dett" (A 2), it is said, "So debt lies upon a judgment within or after the year after recovery: 43 Ed. 3, 2 [B];" and among other instances are mentioned a judgment in an inferior Court removed into a superior Court by error or certiorari: *Risam v. Goodwin* (g), *Herbert v. Alcocke* (h); a judgment on a recognisance against bail: Rol. Abr. tit. "Dett" (M), 8, *Lovell's case* (i); a judgment in scire facias: *Obrian v. Ram* (k).

(a) 4 Taunt. 705.

(b) 1 E. & B. 805.

(c) 9 Exch. 288.

(d) 2 E. & B. 14.

(e) 8 B. & C. 16.

(f) 9 M. & W. 810.

(g) Hutt, 117.

(h) 1 Lev. 134.

(i) 2 Leon. 14.

(k) 3 Mod. 186.

Those authorities shew that it cannot be a sound principle, that because a duty created by the order of a Court cannot be enforced by it, an action will lie on the order. The true ground of the decision in *Carpenter v. Thornton* (a) was, that the duty was founded on mere equitable considerations, and therefore could not be enforced in a Court of law. But where, as in this case, a statute creates a legal duty to pay a sum of money, debt will lie for its recovery, unless some other specific remedy is prescribed. In *Henley v. Soper* (b), Lord *Tenterden*, adverting to *Carpenter v. Thornton*, said, "My judgment proceeded on the particular circumstances of that case: the bill was for the specific performance of an agreement, which is a matter entirely of equitable jurisdiction." In *Henderson v. Henderson* (c), it was held that debt was maintainable on a decree of a colonial court of equity, simply ascertaining a balance and ordering payment by the defendant to the plaintiff. So in *Russell v. Smyth* (d), it was held that an action would lie on a decree of the Court of Session in Scotland for costs in a suit for a divorce. The principle, that an action will lie on the decree of a foreign court, because that court cannot enforce it in this country, would go to this extent, that no action could be maintained on a judgment of the superior Courts at Westminster. *Hookpayton v. Russell* (e) was the case of a Judge's order, which merely imposes a duty to the Court for the breach of which the party is liable to an attachment. *Fry v. Malcolm* (f) was the case of an interlocutory order. *Berkeley v. Elderkin* (g), and *Austin v. Mills* (h), were decided on the construction of the County Court Acts. In *Patrick v. Shedden* (i), there was a mere interim order, which could not form the subject of an ac-

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(a) 3 B. & Ald. 52.

(b) 8 B. & C. 16.

(c) 6 Q. B. 288.

(d) 9 M. & W. 810.

(e) 10 Exch. 24.

(f) 4 Taunt. 705.

(g) 1 E. & B. 805.

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tion, for non constat it might not be reversed. Here a duty is created by the order, which is enforceable on two grounds: first, because it is an order made in pursuance of a statutable authority, and therefore having the force of a judgment; secondly, because it is an order in the nature of a final judgment for costs.—[He then referred to the 3rd, 21st, and 28th sections of the 3 & 4 Will. 4, c. 41.]

Bovill in reply.—The order is not final. In *Macqueen* on the Appellate Jurisdiction of the Privy Council, p. 718, it is said, "At the first council held after the report has been read in Court, it is submitted to the Queen for approval. An Order of Council is then drawn up, reciting and approving the report, and giving judgment accordingly; which the governor or the court below is directed to carry into execution." Until the order has been remitted to the Colonial Court, and judgment there given upon it, it is in the nature of an interlocutory order only. *Emerson v. Lashley* (a) is also an authority that no action will lie on this order.

ALDERSON, B.—I am of opinion that this action is maintainable. It is laid down, that, wherever there is the judgment of a court of competent jurisdiction for payment of a sum of money, an action will lie thereon; for the law gives so much credit to the judgment as to consider that the sum is due. In this case there is an Act of Parliament, under which a party is ordered to pay such costs as the Court shall adjudge him to pay. Therefore a debt is created by the statute under which the ultimate judgment is to be enforced. It has been argued that the order is not final, but it appears to me that it is. Looking at the nature of the proceedings, it is so; for nothing remains to be done, so far as the present plaintiff's claim is concerned,

(a) 2 H. Bl. 248.

except to carry into effect the order of the Judicial Committee of the Privy Council. A suit was pending between the present defendants and Spragg and Hutchinson, and it may be that it is still undetermined. Incidental, however, to that suit, there is a proceeding by process, similar to that of garnishment in the Lord Mayor's Court of the city of London by which property of the debtors in the hands of third persons was capable of being seized and disposed of for the benefit of the creditors, the present defendants. Three persons were mentioned in the writ of attachment as having in their hands debts or property belonging to the original debtors, and which were thus to be taken possession of by the court. Accordingly, the parties were examined, and it appeared that they had property of the original debtor, and it was seized under the writ of attachment. Thereupon another process was begun by the present plaintiff, who up to that time had nothing to do with the matter. The plaintiff *intervened* and said that the property seized under the writ belonged to him, and he claimed that it should be decided by the court whether it belonged to him, and whether it ought to be brought into court to pay the debts of the parties then sued. That was discussed and determined by the Court of King's Bench at Montreal in favour of the present plaintiff, and thereupon the property so seized was ordered to be delivered up to him. If the matter had stopped there, the intervention suit would have been at an end and the plaintiff would have had nothing further to do with the transaction. It is not, however, permitted to stop there, because the unsuccessful parties had a right to appeal to the court of Quebec. They did so, and that court took a different view of the rights of the plaintiff, and reversed the decision of the Court of King's Bench at Montreal, and ordered the plaintiff to restore the property and pay the costs of the appeal. Thereupon the property became amenable to the debts of

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the original debtors, as if the plaintiff had never intervened at all. The plaintiff then appealed to the Judicial Committee of the Privy Council, who referred the question to an arbitrator, who, after investigating the matter and going through the accounts, reported to the Privy Council in favour of the plaintiff. The Privy Council adopted that report, determined that the property belonged to the plaintiff, reversed the decision of the Court at Quebec, established that of the Court at Montreal, and gave the plaintiff his costs. The intervention suit is therefore at an end; and nothing remains but to put the plaintiff in the position in which he was when the appeal was first made. It is true, that the suit in which these proceedings took place may or may not be at an end, but, at all events, the intervention suit is at an end. Incidental to the ultimate allowance of his rights, the plaintiff incurred an expense of 1090*l.* 18*s.* 4*d.*, and therefore the Queen, confirming the order of the Judicial Committee of the Privy Council, that those costs when ascertained should be paid, made an order accordingly. Under the Act regulating the jurisdiction of the Privy Council, these costs are, upon such order being made, to be paid by the person ordered to pay them. By force of the power given by the Act, the costs become a sum of money due under the authority and by the direction of the Act; and the duty arising out of that is a debt for which the party may sue in a Court of law. He has done so in this action, and he has a right to do so.

MARTIN, B.—I am of the same opinion. I agree, that, if this were an interlocutory order for payment of a sum of money, no action could be maintained upon it; but it is not an interlocutory, but a final order. It would only be occupying time unnecessarily to repeat what has been so clearly explained by my Brother *Alderson*; it is enough to say

that all legal proceedings consequent on the seizure of the goods are at an end, and the matter cannot be disputed in this or any other Court, for the highest Court of appeal has given a conclusive decision upon it. Under the Common Law Procedure Act, 1854, similar proceedings may be taken. The 61st section gives the power to attach a debt due from a third party to the defendant, and the 64th section provides, that, in the event of the garnishee disputing his liability, proceedings may be taken by writ; and there can be no doubt, that, upon the determination of that suit one way or another, it is entirely complete and at an end for ever. Therefore, it is a fallacy to suppose that the order of the Privy Council, on which this action is founded, is an interlocutory order, or one over which the Court in Canada can exercise any control. Then it is said by Mr. *Bovill*, that the order can alone be made by the Judicial Committee of the Privy Council and not by the Queen. I am not prepared to say that he is not right in this respect; but I find that the judgment of the Privy Council is, that "in case her Majesty should be pleased to approve of their report and order as therein recommended, there should be paid by the respondents to the plaintiff the sum of 1090*l.* 18*s.* 4*d.* for the costs of the proceedings under the reference." So that the Judicial Committee of the Privy Council have, contingently on the Queen approving of their report and order, directed the money to be paid; and the declaration goes on to allege that the Queen did confirm the report, and, further, ordered that sum to be paid. The latter allegation may be surplusage; but that does not affect the order by the Judicial Committee, that, upon the event which has happened, viz. the approval by the Queen of this report and order, a fixed sum of money should be paid by the defendants to the plaintiff. Then, had the Committee authority to make that order? The 15th section of the 3 & 4 Will. 4, c. 41, enacts, "that the costs incurred in the prosecution of

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any appeal or matter referred to the Judicial Committee &c., shall be paid by such party or parties, person or persons, and in such manner as the said Committee shall direct." Probably, the Committee had no authority under that section to make this order; but by the 6 & 7 Vict. c. 38, s. 12, it is declared and enacted, "that, as well the costs of defending any decree or sentence appealed from as of prosecuting any appeal or in any manner intervening in any cause of appeal, &c., shall be paid by such party or parties, person or persons, as the said Judicial Committee shall order" &c. It seems to me that this order is within that enactment. Then what is the consequence? It is a well-known rule of law, that, if a statute directs a sum of money to be paid, unless a specific remedy is given, debt may be maintained for its recovery. It is so laid down in Com. Dig. "Dett." (A 1) and "Action upon Statute," (E), and by Lord Holt, in an *Anonymous case*, in 6 Mod. 27. On that principle the Court of Queen's Bench, in the case of *Regina v. The Hull and Selby Railway Company* (a), refused to grant a mandamus for the payment of money due under a railway Act, since an action of debt might be maintained for it. For these reasons I think that, inasmuch as a sum of money has been ordered by a competent tribunal to be paid, and a statute expressly directs that it shall be paid, this action will lie for its recovery.

BRAMWELL, B.—I am of the same opinion. If this order had been a portion of the proceedings in the cause, that is, a part of the final judgment in the Canadian Court or of the Privy Council, I should have thought that there would have been no difficulty in maintaining an action upon it. But that is not the true view of the case, for this order is no part of the original proceedings, but a collateral order

(a) 6 Q. B. 70.

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by the Judicial Committee of the Privy Council for payment of a sum of money, and I think that even if the original suit remained undetermined, this order might be enforced by action, unless it appeared that it might be varied, or that it was subject to conditions. In *Hopkins v. The Mayor of Swansea* (a), this Court adopted the principle laid down in Comyn's Digest, and held that an action of debt was maintainable where a statute created a duty or obligation to pay money. Mr. Bovill seems to admit, on the authority of the cases in Comyn's Digest, that an action might be maintained on an order of this description; but he says that it is not maintainable in this particular instance, because process is given to the Court to enforce its own orders. I am inclined to think that the Court has that power; for, looking at the 6 & 7 Vict. c. 38, the remedy by sequestration is only applicable to appeals from the Ecclesiastical or Admiralty Courts; and the remedy by ordinary execution is given to the Privy Council by the 3 & 4 Will. 4, c. 41, s. 28. But is Mr. Bovill right in saying, that, because the Court has power to enforce its orders by execution, no action is maintainable upon them? I am not aware of any cases except those of decrees in equity and judgments in county courts, in which it has been held that no action will lie upon the final order or judgment of the Court for payment of a sum of money. Cases of decrees in equity are distinguishable, for there is no implied promise to pay a mere equitable debt. Judgments in county courts are also distinguishable for the reasons stated in *Berkeley v. Elderkin* (b). Reference has also been made to interlocutory orders for costs. Probably, the true reason why no action will lie on such orders is this—the power of Courts of common law to award costs on a judgment arises from the statute of Gloucester, 6 Edw. 1, c. 1; it may be, that the power to award interlocutory costs is a power incident to every

(a) 4 M. & W. 621.

(b) 1 E. & B. 805.

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court to enforce due observance of its own rules; and if so, it is manifest that the disobedience of an order for the payment of such costs is properly punishable by attachment. Whether that is a good ground for the distinction I do not know; but when an Act of Parliament says that the Judicial Committee of the Privy Council shall have power to make orders for the payment of costs, and that the money shall be paid, the case comes within the principle of law, that debt will lie for the money. I therefore think that the plaintiff is entitled to our judgment.

Judgment for the plaintiff.

Feb. 6.

MARY WELD v. BAXTER.

A declaration in covenant by devisee of the reversion against lessee, alleged that the reversion of and in the demised premises belonged to the lessor and his heirs. Plea, that the reversion of and in the demised premises did not belong to the lessor and his heirs. Replication by way

of estoppel, that the lease was an indenture executed by the defendant, and that he entered and enjoyed the demised premises by virtue of the indenture; that it did not appear by the indenture, that the lessor was not seised in fee, or that he had any estate or interest other than a fee simple; nor did the indenture contain anything to shew that the reversion did not belong to the lessor and his heirs. On demurrer to the replication,—*Held*, that the plea was good, under the Common Law Procedure Act, 1852, as traversing a material allegation in the declaration; also, that the replication was bad, since the lessor might have had a term of years, or an estate for life, or pour autre vie.

COVENANT.—The declaration stated, that, by an indenture, dated the 24th of April, 1843, and made between George Weld of the one part, and the defendant of the other part, and sealed and executed by the parties respectively, George Weld did demise and lease unto the defendant a certain messuage, &c.: habendum for the term of twenty-one years from the 25th of March, 1843, at the yearly rent of 53*l.*, payable quarterly.—[The declaration then set out the covenant for payment of the rent.] By virtue of which demise the defendant entered into and upon the demised premises, &c., "*the reversion of and in the demised pre-*

wises then belonging to the said George Weld and his heirs."

—The declaration then stated, that George Weld,* being so seised, on the 19th of February, 1838, made and published his last will and testament, and thereby devised the reversion of and in the demised premises unto the plaintiff for and during the term of her natural life: that George Weld afterwards died so seised of the reversion of and in the said demised premises without altering his said will; whereupon and whereby the plaintiff then became and was seised in her demesne as of freehold, for the term of her natural life, of and in the said demised premises.—Averment of performance of conditions precedent.—Breach: nonpayment of two quarters rent.

Plea—That the reversion of and in the demised premises did not belong to the said George Weld and his heirs, as in the declaration alleged.

Replication by way of estoppel—That the lease in the declaration mentioned to have been made by the said George Weld to the defendant, was an indenture sealed and executed by the defendant and the said George Weld respectively: that, under and by virtue of the said indenture, the defendant did enter into and upon the demised premises, and became possessed of the said term so to him by the said indenture granted; and that the defendant, at the time of the breach in the declaration mentioned, occupied, possessed, and enjoyed the demised premises under and by virtue of the said indenture, and by no other title whatsoever: that it does not appear in or by the said indenture, that the said George Weld was not seised in fee of the said demised premises, or that he had any estate or interest therein other than a fee simple, or any particular estate or interest whatsoever; nor doth the said indenture contain anything to shew that the reversion of and in the said demised premises did not belong to the said George Weld and his heirs, as in the declaration alleged.—Prayer of judgment, if the defendant ought to be admitted, against the said indenture and

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the reversion thereby admitted to be in the said George Weld, to plead the said plea.

Demurrer and joinder therein.

Kingdon argued in support of the demurrer (Feb. 5).—The defendant is not estopped from denying that the lessor was seised in fee of the reversion. A party who sues as the assignee of the reversion must shew all that is necessary to make a title in himself: *Gilbert on Debt*, bk. 2, cap. 3. This is not a plea that the lessor had no estate in the premises, but only that he had not such an estate as is alleged. The doctrine of estoppel never operates where an interest passes. If a lessor demises for a term of ninety years, and afterwards dies, the lessee is not estopped from shewing that the lessor had an estate for life only. In *Carvick v. Blagrove* (a), which was an action of covenant by the assignee of lessor against lessee, it was held that an allegation that the lessor was possessed for the remainder of a term of twenty-two years, was material and traversable. There *Dallas*, C. J., after observing that as between lessee and lessor the estoppel was in full force, says, "This estoppel has equal effect between the lessee and one who is privy, or, in other words, derives his legal title from the lessor. But the lessee is under no engagement to any one who is not the legal assignee." *Palmer v. Ekins* (b) was there referred to, and distinguished on the ground that the plea amounted to a special nil habuit in tenementis. [*Bramwell*, B.—A lease may be good as against a lessor by estoppel: *Webb v. Austin* (c), *Gouldsworth v. Knights* (d).] The question whether an assignee of a lease operating by estoppel can take advantage of the covenants contained in it, does not arise here, because the lessor may have had an interest which passed to his executor, or he may have been tenant for life only. In 2 Wms. Saund. 417 a, note (1), it is said,

(a) 1 B. & B. 531.

(b) 2 Str. 817; 2 Ld. Raym. 1550.

(c) 8 Scott, N. R., 419.

(d) 11 M. & W. 337.

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"Although it be a general rule; that, where there is a lease by indenture, the lessee is estopped from alleging that the lessor had no interest in the demised premises during the joint lives of lessor and lessee; yet if in truth the lessor was only tenant for life, the lessee is not prevented from saying so in answer to an action of covenant brought against him by the heir of the lessor after his death." Here the defendant was obliged to traverse the title in the terms in which it is alleged; but under that traverse he may shew that the lessor had an estate for life only. If the plea had stated the interest of the lessor, it must, before the Common Law Procedure Act, 1852 (a), have concluded with a special traverse of the title alleged: *Brudnell v. Roberts* (b). This plea is consistent with the supposition that some interest passed under the lease. In 2 Wms. Saund. 418 b, note (c), it is said, "It is not essential that the grantor should convey the real interest only which he has in the estate; for if he grants a larger interest than he is entitled to, still, as *some* interest passes by the conveyance, though it be for a shorter period than he intended and the conveyance professes to grant, it is sufficient, and will prevent an estoppel for a longer period than the legal duration of the estate so granted." In *Doe. d. Strode v. Seaton* (c), a lessee for years covenanted to pay the rent and deliver up possession of the premises to the lessor, his *heirs and assigns*: after the expiration of the term the devisee of the lessor brought ejectment against the assignee of the lessee, and it was held that the assignee was not estopped by such covenant from shewing that the lessor was only tenant for life of the demised premises. There is no allegation in the replication inconsistent with the fact of the lessor having had an estate for life only. [*Alderson*, B.—If there is no estoppel because an interest passed, ought not the defendant to have shewn affirmatively that some interest passed?] He is not bound

(a) Sect. 65.

(b) 2 Wils. 143.

(c) 2 C. M. & R. 728.

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to do so, but only to plead in a manner not inconsistent with the fact of some interest having passed.

Raymond contra.—First, the replication is good. It discloses facts, which, *primâ facie*, estop the defendant from denying the plaintiff's title, and the onus is on the defendant to get rid of the estoppel. The plaintiff could reply in no other way. If he had taken issue on the plea, and it appeared at the trial that the legal estate was in a mortgagee at the time the lease was granted, the issue would have been found against him. If he had not replied the estoppel, the matter would have been at large, and the jury might have disregarded it: *Magrath v. Hardy* (a). *Doe v. Wright* (b), *Doe v. Huddart* (c), and *Matthew v. Osborne* (d), are authorities that this matter is properly replied by way of estoppel. The defendant ought to have shewn in answer that the interest of the lessor was determined. A reversion by estoppel is, *primâ facie*, a reversion in fee: *Sturgeon v. Wingfield* (e).—Secondly, the plea is bad. It denies in terms the lessor's title, which, if he had no other, and none other appears, the defendant is estopped from denying. The only way, therefore, to plead is, to shew affirmatively what particular estate the lessor had, which is inconsistent with the plaintiff's title as devisee: Stephen on Pleading, 204, 205, 5th ed.; *Brudnell v. Roberts* (f). Formerly, the statement of the particular estate ended with a special traverse of the title alleged in the declaration. It was, however, necessary that the inducement should of itself afford a substantial answer, the special traverse being added merely to avoid the objection of argumentativeness: Stephen on Pleading, p. 212, 5th ed. *Parker v. Manning* (g), *Gouldsworth v. Knights* (h), and *Palmer v. Ekins* (i), are authori-

- (a) 4 Bing. N. C. 782.
- (b) 10 A. & E. 763.
- (c) 2 C. M. & R. 318.
- (d) 13 C. B. 919.
- (e) 15 M. & W. 324.

- (f) 2 Wils. 143.
- (g) 7 T. R. 537.
- (h) 11 M. & W. 337.
- (i) 2 Str. 817; 2 Ld. Raym. 1550.

ties that an assignee of the lessor may take advantage of the estoppel. In *Carrick v. Blagrove* (a), the estoppel was not relied on. A lessee cannot plead in bar that the lessor had only an equitable estate in the premises: *Blake v. Foster* (b).—He also referred to *The Proprietors of the Cross Keys, Bride v. Rawlings* (d), *Beckett v. Bradley* (e), *Bowman v. Taylor* (f).

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Kingdon replied.

The Court suggested that the plaintiff should amend by taking issue on the plea; and the case stood over, to enable the plaintiff's counsel to consider whether he would do so. On the following day he stated that he declined to amend; whereupon,

ALDERSON, B., said.—We are of opinion that there must be judgment for the defendant. The plea is good under the Common Law Procedure Act, 1852, as traversing a material allegation in the declaration; and the replication is bad, because it does not exclude every possible estate in the lessor: he may have had a term of years, an estate for life, or an estate *pur autre vie*.

Judgment for the defendant.

(a) 1 B. & B. 531.

(b) 8 T. R. 487.

(c) 3 Bing. N. C. 71.

(d) 8 Scott, N. R., 843.

(e) 7 Man. & G. 999.

(f) 2 A. & E. 278.

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Feb. 23.

ALSTON and Others v. HERRING.

THE declaration stated, that the plaintiffs caused to be shipped on board a ship of the defendant's, called "The Hope," certain goods of the plaintiffs, namely, cambrics and shirtings, such goods then being in good order and well conditioned, to be carried and conveyed on board the said ship of the defendant's, for the plaintiffs, from Glasgow, in Scotland, to Colombo in the Island of Ceylon, and there delivered by the defendant in like good order and well conditioned, (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted), unto certain persons there carrying on business under the firm of Messrs. Alston, Scott, & Co., or to their assigns, for certain freight and reward to the defendant in that behalf; and the defendant then received the said goods on board the said ship for the purpose aforesaid, and agreed with the plaintiffs so to carry and convey the same, and to deliver them in like good order and well conditioned; yet the defendant, although he carried the said goods from Glasgow aforesaid to Colombo aforesaid on board the said ship, and there delivered them, did not deliver them in like good order and well conditioned according to his agreement, although not prevented from doing so by the act of God, the Queen's enemies, fire, or any danger or accident of any nature or kind, of the seas, rivers, or navigation; but, on the

The plaintiffs chartered the defendant's vessel for a voyage from Glasgow to Colombo. The plaintiffs sent on board the vessel some cambric goods, and they agreed with M. & Co. for freight to carry goods for them. M. & Co. shipped a quantity of sulphuric acid, which was stowed by the defendant near the plaintiffs' goods. The master signed and delivered to the plaintiffs bills of lading for the goods and acid. It was alleged to be the duty and custom of merchants, who shipped sulphuric acid, to give notice of the same to the shipowner. No notice was given to the defendant. In the course of the voyage the sulphuric acid leaked and damaged the plaintiffs' goods. In an action by the plaintiffs on the bill of lading, for not delivering the goods in good condition:—*Held*, first, that the neglect of the plaintiffs to give notice of the shipment of the sulphuric acid was no excuse for the defendant's breach of contract, since it was only a remote cause of the damage, the proximate cause being the act of the defendant in placing the acid where it was; and that, even if the declaration had been on the charter-party, and it had contained an agreement to inform the defendant when sulphuric acid was shipped, and the plaintiffs had actually shipped it, the defendant would nevertheless have been liable: Secondly, that there was no defence on the ground of avoiding circuity of action; since the damages which the defendant would recover in an action against the plaintiffs for omitting to give notice of the shipment of the sulphuric acid, would not necessarily be the same as the plaintiffs would recover against the defendant.

contrary, delivered the same at Colombo aforesaid in much worse order, and in bad condition, and much damaged.

Plea—That, before the plaintiffs caused the said goods to be shipped, the defendant, being the owner of the said ship, chartered the said ship to the plaintiffs by a certain charterparty of affreightment, in which the defendant is described by his name of William Herring, and the plaintiffs are described by the style of Campbell, Rivas, & Co.—The plea then set out the charterparty, which (so far as material) was as follows:—

“Glasgow, May 19th, 1854.

“It is this day mutually agreed between William Herring, owner of the good ship or vessel called ‘The Hope, of Sunderland,’ &c., on the one part, and Campbell, Rivas, & Co., of Glasgow, merchants and freighters, of the other part: that the said ship, being tight, staunch, and strong, &c., shall with all convenient speed be made ready at a loading berth at the Broomielaw, at Glasgow, or so near thereunto as she can safely get, and there load from the factors of the said merchants a full and complete cargo of legal merchandise, the owner guaranteeing the vessel to load to a draught of 14½ feet aft, and 13½ feet forward, which cargo the said merchants hereby engage to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and being so loaded shall therewith proceed to Colombo, Ceylon, or so near thereunto as she can safely get, and deliver the same to the said freighters or their assigns, freight for the same being paid at and after the rate of a lump sum of 1250*l.* sterling, if despatched from Glasgow on or before the 20th of June next, or 1300*l.* sterling, if despatched on or before the 3rd of July next, for the full and entire of said vessel’s hold for the voyage, except sufficient room for water and provisions, (the act of God, restraint of princes and rulers, the Queen’s enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatsoever nature and kind soever during the said voyage always excepted).”—The

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charterparty then provided for the payment of the freight, the time of loading, demurrage, &c.—it being agreed, “that, for the security and payment of all freight, dead freight, demurrage, and other charges, the said master or owners shall have an absolute lien and charge on the said cargo or goods laden on board; bills of lading to be signed by the master as presented to him, at any rate of freight, without prejudice to this charterparty,” &c.

The plea then stated that the defendant and the plaintiffs mutually agreed to perform and fulfil all things on their respective parts, that is to say, on the part of the defendant as owner and on the part of the plaintiffs as freighters, to be respectively performed and fulfilled according to the said charterparty. That, under and in pursuance of the charterparty, the plaintiffs caused to be shipped a certain cargo on board the said ship, to be therein carried under the said charterparty, from Glasgow in the said charterparty and declaration mentioned, to Colombo in the said charterparty and declaration mentioned. That the goods in the declaration mentioned were part of the said cargo, and that the shipping of the said goods was the said shipping thereof under the said charterparty; and that the defendant so received the same on board the said ship under the said charterparty. That, upon receiving the said goods, the master of the said ship, under and in accordance with the clause in that behalf contained in the said charterparty, signed bills of lading presented to the said master by the plaintiffs in respect of the goods in the declaration mentioned, stating that the goods were shipped in good order and well conditioned, and were to be carried and conveyed on board the said ship from Glasgow to Colombo, and then delivered in like good order and condition (the act of God, the Queen’s enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted) unto certain persons at Colombo, carrying on business under the firm of

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Messrs. Alston, Scott & Co., or to their assigns, for certain freight and reward to the defendant in that behalf. That, in manner aforesaid and not otherwise, the defendant agreed with the plaintiffs. That the plaintiffs not wishing to make up the whole of the said cargo with goods of their own, contracted with certain other persons, carrying on business under the firm of Messrs. Milne & Co., to receive from the said Messrs. Milne & Co. and carry certain cases containing goods on board the said ship from Glasgow to Colombo, for freight to be therefore paid by the said Messrs. Milne & Co. to the plaintiffs. That the said Messrs. Milne & Co., under and by virtue of their said contract with the plaintiffs, and not by virtue of any other contract between Messrs. Milne & Co. and the defendant, or any servant or agent of the defendant, shipped on board the said ship the said cases containing the said goods as part of the said cargo shipped by the plaintiffs, and to be carried by the defendant under the said charterparty; whereupon the master of the said ship, under and in accordance with the clause in that behalf contained in the said charterparty, signed bills of lading presented to him in respect of the said cases containing the said goods, expressing that freight was to be paid for the carriage of the said cases containing the said goods, which said freight was the freight so to be paid to the plaintiffs as aforesaid. That the said goods so contained in the said cases were a liquid, called sulphuric acid, the same being a liquid of a very corrosive quality, and of such corrosive powers as that, if it should come or comes into contact with other goods, the generality of goods would be greatly injured thereby; that, according to the usage and practice amongst shipowners and freighters at Glasgow and elsewhere in Great Britain, it was at all the times aforesaid, and now is, the duty and custom of the shippers of sulphuric acid, on shipping the same on board a ship, and it was the duty of the plaintiffs, on the said sulphuric acid being so shipped on board the said ship, to give notice to the

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owner or owners of such ship, or to his or their agents, of the articles so shipped being sulphuric acid, in order that such owner or owners may cause such sulphuric acid to be stowed on board the said ship in some place where, if it should leak, it would not come in contact with other parts of the cargo likely to be injured thereby. That the plaintiffs being, as between the plaintiffs and the defendant, the shippers of the sulphuric acid which was so shipped on board the same ship as aforesaid, did not, nor did the said Messrs. Milne & Co., or any person, at any time give, but the plaintiffs wrongfully neglected and omitted to give, to the defendant any notice that the said goods in the said cases, or any part thereof, were or was sulphuric acid, nor had the defendant or any agent or agents of the defendant, at any time before the damage was done as hereinafter mentioned, any notice that the said goods so contained in the said cases, or any part thereof, were or was sulphuric acid; by reason whereof the defendant, without any neglect or default or wrongful act on his part, or on the part of any agent or servant of the defendant, caused the said cases containing the said sulphuric acid to be stowed, and during the said voyage to be safely stowed, on board the said ship, near to the goods in the declaration mentioned, which he would not have done if he had had notice that the said goods were sulphuric acid; by reason whereof some of the sulphuric acid, which, without any neglect or default or wrongful act on the part of the defendant, or of any agent or servant of the defendant, leaked out of the said cases and came into contact with the goods in the declaration mentioned, during the said voyage from Glasgow to Colombo, which was made by the said ship under the said charterparty, greatly damaged the said goods, and thereby made them to be in such much worse order than the good order and good condition in which they were shipped, and caused them to be in such bad condition, and so damaged them as in the declaration mentioned; by means whereof, and not otherwise, the

defendant, without any wrongful act, neglect, or default on his part, or on the part of any agent or servant of the defendant, was prevented from performing his said agreement, and was compelled to commit the breach thereof in the declaration complained of. That the said breach of contract, and the said damage so done to the said goods, was solely occasioned by the default and neglect on the part of the plaintiffs, as shippers of the said sulphuric acid, in omitting to give such notice as aforesaid of the said goods being sulphuric acid; so that if the defendant is compelled to pay to the plaintiffs any money for the said damage so done to the said goods, or for the said breach of promise, the defendant will be entitled to recover the same amount from the plaintiffs as damages by him sustained, by reason of their omitting to give such notice as aforesaid.

Demurrer, and joinder therein.

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Cleasby (Wilde with him) argued in support of the demurrer (Feb. 8).—The plea affords no answer to the action. The first ground of defence is that the injury to the goods was caused by the misconduct of the plaintiffs. It is not, however, alleged that the act of the plaintiffs was the proximate cause of the damage, but only that their negligence in some degree contributed to it. The defendants are liable for their breach of contract, notwithstanding it may have been occasioned remotely by the negligence of the plaintiffs: *Bishop v. Pentland* (a), *Shaw v. Robberds* (b). Moreover, it is doubtful whether the plaintiffs were guilty of negligence. The plea states that it was the duty and custom of the shippers of sulphuric acid to give notice thereof to the shipowner. In this case the shippers were Milne & Co. The custom can only apply to persons who must necessarily know that they are shipping dangerous goods.—Secondly, the plea alleges that if the plaintiffs recover against the defendant for the damage done to the goods, the defendant would

(a) 7 B. & C. 219.

(b) 6 A. & E. 75.

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be entitled to recover the same amount in an action against the plaintiffs for their negligence in not giving the notice; and, consequently, there is a defence, on the ground of avoiding circuity of action. To constitute a good plea in avoidance of circuity of action, it must appear that the same amount of damages must necessarily be recovered in each action: *Charles v. Alkin* (a). But it by no means follows that the defendant would recover in a cross action the precise sum which the plaintiffs might recover in this action. It may be, that the sulphuric acid was improperly stowed, or that the defendant omitted to remove it after he was aware that the vessels leaked. In *Thompson v. Gillespy* (b), which was an action on a charterparty, the defendant pleaded that the ship was not, at the commencement of the voyage, tight, staunch, and strong, &c., and that by reason thereof the ship and cargo were wholly lost; and it was held, that the plea could not be supported on the ground of avoiding circuity of action. Besides, if the plaintiffs are liable at all, they would be liable for all the consequences of their negligence, and damages might be recovered against them not only in respect of the goods which are the subject matter of this action, but also for injury to the goods of other persons on board the ship, and for injury to the ship itself. It is clear, therefore, that the cross claims between the defendant and the plaintiffs are not identical. It is not like the case of a covenant not to sue, for that amounts to a release.

Lush (*Hugh Hill* with him) contra.—First, the plea shews a lawful excuse for the breach of contract. A merchant who charters a ship and carries in it other persons' goods is, as between himself and the shipowner, the shipper of the goods. Therefore the case is the same as if the plaintiffs themselves had sent on board the vessel both the

(a) 15 C. B. 46.

(b) 5 E. & B. 209.

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goods and the sulphuric acid, and the defendant had properly stowed them, and then, without any negligence on his part, the acid leaked and injured the goods. A guest, who has been guilty of gross negligence and thereby conducted to his loss, cannot recover against an innkeeper: *Armistead v. Wilde* (a). [Alderson, B.—The liability of an innkeeper depends on the custom of the realm, not on contract.] The plaintiffs immediately conducted to their loss by not giving the defendant notice of the dangerous nature of the goods they sent on board. Suppose a merchant shipped wine in improper casks, so that they burst, would the shipowner be liable? Here the acid leaked without any wrongful act or omission on the part of the defendant. Moreover, the defendant's obligation is not created by the bill of lading, but by the charterparty. He is not responsible as a common carrier, but only according to the terms of his contract.—Secondly, the plea affords a defence on the ground of avoiding circuitry of action. If the defendant sued the plaintiffs for negligence in not giving notice of the shipment of the sulphuric acid, the measure of damage would be the amount which the plaintiffs recovered against the defendant for the injury to the goods. There is no contract by the defendant with Milne & Co.: the defendant could only sue the plaintiffs: *Major v. White* (b). The defendant would have no right of action against the plaintiffs unless they recovered against him, for, until then, he would have sustained no damage.

Cleasby replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B.—In this case we are of opinion that the plaintiffs are entitled to judgment. Many questions arose

(a) 17 Q. B. 261.

(b) 7 Car. & P. 41.

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in the course of the argument which it is not necessary to determine.

The defendant contended, (and we think rightly), that his obligation was no greater or other than that contained in the charterparty. Assuming that to be as the defendant contends, it is nevertheless clear that a contract by the defendant existed, which was broken by the damage sustained by the plaintiffs' goods, unless the defendant can excuse or justify himself. For this purpose the defendant contended that the plaintiffs were, as between them and him, the real shippers of the sulphuric acid, and that there was a duty or obligation on their parts to inform him of the nature of the article. We assume this also in the defendant's favour, without expressing any opinion whether or not he has made out this part of his case. For the purposes therefore of our decision, it may be taken as though the declaration was on the charterparty, as though that charterparty contained an agreement to inform the defendant whenever sulphuric acid was shipped, and as though the plaintiffs were the actual shippers of the sulphuric acid. But assuming all this, as the defendant contends, we are still of opinion that the plea is bad.

The defendant makes his defence on two grounds: the first being, that the plaintiffs themselves caused the breach, or prevented the performance, of the contract; and no doubt, if this were so, the defendant would have an answer to the action: Sheppard's Touchstone, 174; Com. Dig. "Condition" (L 6). But in this case the plaintiffs are not the cause, in the sense of the rule referred to, which means where the obligee or covenantee does the very act complained of, or *actually* prevents performance—where he is the proximate not the remote cause, the *causa causans*, not merely the *causa sine qua non*. True, but for the shipment of the acid without notice, (the plea alleges), the damage would not have happened, but that shipment alone was not enough. A further act was necessary, viz. placing the acid where it

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was placed in the ship. That act was the defendant's, and he was, therefore, the causer, the immediate causer, of the damage.

The other ground of defence set up by the defendant was, that he would be entitled to recover from the plaintiffs whatever they recovered from him, and so, for avoiding circuity, the action was not maintainable. The principles on which this rule is to be applied are to be found in *Charles v. Altin* (a). It is impossible to say, as matter of law, that, if the plaintiffs recover in this action, a jury ought in a cross action to make them refund the same sum to the defendant. In such an action, might not the defendant well object, that though the defendant would not have put the cases where he did had he known they contained sulphuric acid, yet, as he was content to run the risk of their containing some fluid which might have caused the damage or a part of it, it would be unreasonable to make the plaintiffs liable for the whole damage, because it turned out that the cases contained sulphuric acid? We think so. It is true, the plea says, the cases were placed as they were without any neglect, default, or wrongful act of the defendant. But either this is an impossibility, or it means no more than that the so placing was neither negligent nor intrinsically wrong. Be it so; but it is certain, that, had the contents of the cases been some fluid, not sulphuric acid, and which had escaped and damaged the cambric, the plaintiffs would have been entitled to recover, whether the defendant had been negligent or not. We think, therefore, a jury might take this into consideration in estimating the damages, if the now defendant sued the plaintiffs on the supposed contract not to ship sulphuric acid without notice, and consequently that the damages in such an action might be different from those recoverable in this; and that the rule for preventing circuity of action does not apply. Many other

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difficulties as to the amount of these damages might be suggested; so that it is impossible to say that it is clear that the same amount of damages must be found in both actions.

On both grounds, therefore, the defendant has failed, and the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

Feb. 23. SARAH WIGGETT, Administratrix of JOHN WIGGETT, deceased, v. FOX & HENDERSON.

THE declaration stated, that the defendants, by themselves and their servants, were erecting a certain tower in and upon certain land belonging to the Crystal Palace Company; and it then became and was the duty of the defendants to erect the said tower in a careful and proper manner, and to take proper precaution against any injury happening to persons who should pass by or near to the said tower, whilst the same was being so erected: Yet the defendants did not regard their duty in that behalf, but by themselves and their servants, negligently, carelessly, and improperly dropped from the said tower a certain heavy instrument, called a rymer, whereby the same fell upon, struck, and killed the said John Wiggett, deceased, who was the husband of the plaintiff, and who then was lawfully passing by and near to the said tower.

Plea (inter alia)—That the said grievance was committed by certain servants of the defendants, to wit, the servants in the declaration mentioned, and solely by their negligence, and not by the negligence of the defendants personally, or kept by the defendants' foreman. M., the sub-contractor, employed W., the plaintiff's husband; and whilst he was at work at the bottom of the tower, the defendants' men, who were at work at the top, negligently let fall an instrument called a "rymer," which struck the plaintiff's husband on the head, and caused his death:—*Held*, that the sub-contractor and his workmen were servants of the defendants, engaged in one common employment with their other servants, and, consequently, that the defendants were not liable under the 9 & 10 Vict. c. 93, for the injury caused by the negligence of the latter.

either of them, and was committed without the authority, knowledge, sanction, or consent of the defendants or either of them; and that such servants were severally, before and at the time of the committing of the said grievance, reasonably fit and competent to be employed in the erection of the said tower, as the said John Wiggett well knew: that before and at the time of the committing of the said grievance, the said John Wiggett was also the servant of the defendants, and in their service and employ, and was then acting as such servant (together with the said first-mentioned servants of the defendants), to wit, in the execution of the said tower.—Issue thereon.

At the trial, before *Wightman*, J., at the last Surrey Assizes, it appeared that the plaintiff sued as administrator under the 9 & 10 Vict. c. 93, to recover compensation for the death of her husband, under the following circumstances:—The defendants, Messrs. Fox & Henderson, had contracted with the Crystal Palace Company to erect for them two high water towers. The materials for the towers were manufactured by the defendants; but they made sub-contracts with one Moss and four other persons to do, by “piece work,” particular portions of the hoisting and fixing; the materials, the scaffolding, and tools necessary for the execution of the work being provided by the defendants. Persons who contracted with the defendants to do “piece work” signed certain printed regulations (a). The workmen

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(a) The following provisions of these “Regulations” were referred to:—

“PIECE WORK REGULATIONS.”

“To be agreed to and observed by persons in the employment of Messrs. Fox, Henderson, & Co.

1. Any person engaging to do piece work shall, before the job is begun, see the terms and con-

ditions under which the engagement is made properly entered by the foreman or timekeeper on a piece work agreement sheet provided for that purpose, attesting such entry by his own signature.

2. No advance of money will be made on account of any piece work in hand over and above the amount of wages due for time worked, at the usual rate

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employed by the sub-contractors were paid weekly by the defendants according to the time they worked, an account

paid to the parties so employed when working by the day, until such job is finished, and the balance determined as described below.

3. Any person engaging to do piece work, in which it is necessary that other workmen should be employed besides himself, is not considered bound to share the balance equally or proportionably with all that may be engaged with him, but only to fulfil such engagement as he may have made with them; and these engagements may be made in any way that the parties please: Provided always, that the person engaging others to assist him shall not arrange for them to receive less than their usual day wages for the time worked.

4. No one that has engaged to do piece work shall receive another man's wages, even though such other man be engaged to assist him with such piece work; the wages of each person engaged on the job will be paid to himself at the usual pay table, calculated at the usual rate which he receives when working day work; and wages so paid will be charged against the person who has engaged to do the piece work in question, just as if they had been paid to himself.

5. When any piece work job is finished, the persons who engaged to do it, and to whom the balance, if any, is due, shall make an entry to that effect on his slate, or report the description of the job, and its number, the

total amount, or the rate at which he agreed to execute it, the day on which it was begun, as well as that on which it was finished, the number and names of the men employed upon it, and the amount which he supposes to be due to him as the balance.

6. Immediately on receiving such entry, the timekeeper shall make out the piece work sheet, which shall be examined and countersigned by the foreman, and which shall shew the balance, whichever way it may stand; and this piece work balance sheet, when made out and signed by the foreman for the time being of the department, shall be final, conclusive, and binding on all parties.

11. The workmen entering into a piece work agreement under these regulations shall not be at liberty to leave his employment until after he has completed his piece work and given one week's notice, such notice not to be given nor accepted until after the piece work is actually finished; and Messrs. Fox, Henderson, & Co. shall not give notice to any workman who has engaged to do piece work until after that piece work is actually finished, unless the work is improperly executed, or the workman has infringed the piece work or workman's rules, so as to render himself liable to instant dismissal, in which case no alleged piece work balance will be paid to him."

of which was kept by the defendants' foreman. The sub-contractors received from the defendants' foreman directions as to the execution of the "piece work." Moss, the sub-contractor, employed Wiggett, the plaintiff's husband; and whilst he was at work at the bottom of one of the towers, the defendants' men, who were at work at the top of the tower, let fall an instrument called a "rymer," which struck Wiggett on the head, and caused his death.

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The learned Judge left it to the jury to say, first, whether the deceased Wiggett was the servant of the defendants or of Moss; secondly, whether the death of Wiggett was caused by the negligence of the defendants' servants. The jury found the latter question in the affirmative; and with respect to the former, they found that Wiggett was the servant of Moss. A verdict was then entered for the plaintiff, with 50*l.* damages, and leave was reserved to the defendants to move to enter a verdict for them, if the Court should be of opinion that the learned Judge ought to have ruled that Wiggett was the servant of the defendants.

Bramwell, in the following Term, obtained a rule nisi to enter the verdict for the defendants or for a new trial, on the ground that the deceased Wiggett was shewn to be a servant of the defendants, or so engaged in common occupation with servants of the defendants, as to render them not liable for the negligence complained of.

C. Pollock shewed cause in last Hilary Term (Jan. 28).—The doctrine laid down in *Priestley v. Fowler* (a), and *Hutchinson v. The York, Newcastle, and Berwick Railway Company* (b), viz. that a master is not responsible to his servant for injury occasioned by the negligence of a fellow-servant in the course of their common employment, does not extend to this case. [*Pollock*, C. B.—There is no dis-

(a) 3 M. & W. 1.

(b) 5 Exch. 343.

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tion in principle. Suppose a builder, who agrees to erect a house, makes separate contracts with other persons to complete certain portions of the work, as for instance with a bricklayer, a carpenter, and plumber, are not the persons employed by the latter the servants of the builder, working together for one common object? Here the jury have found that the deceased was the servant of the sub-contractor, and not the servant of the defendants. [*Alderson*, B.—Unless the principle is extended to a case like this, it would follow that a shipowner would be liable to be sued by all the widows of the sailors who were drowned through the negligence of the master.] In *Hutchinson v. The York, Newcastle, and Berwick Railway Company* (a), *Alderson*, B., in delivering the judgment of the Court, said: "The principle is, that a servant, when he engages to serve a master, undertakes, as between him and his master, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow-servant, whenever he is acting in discharge of his duty as servant of him who is the common master of both." That principle cannot apply to the case of a servant of a sub-contractor. In the ordinary case of master and servant, the servant may be willing to run some risk with fellow-servants whom he knows, and whom he may possibly control, or if he apprehends danger from their carelessness, he may leave the service; but the servant of a sub-contractor may have no knowledge of the persons employed by the general contractor, or if he had, they might be frequently changed without his being aware of it; and if he should give notice to the general contractor that he would work no longer, the former might disregard the notice, as the contract for service was not made with him, but with the sub-contractor. [*Martin*, B.—Moss was not a sub-contractor in the sense that an action would lie against him by a stranger. In *Sadler v. Hen-*

(a) 5 Exch. 343.

lock (a), *Crompton, J.*, says, "The test is, whether the defendant retained the power of controlling the work. No distinction can be drawn from the circumstance of the man being employed at so much a day or by the job."] The plaintiff was not the servant of the defendants, so as to bring this case within the decisions of *Skipp v. The Eastern Counties Railway Company* (b), and *Farwell v. The Boston and Worcester Railroad Corporation* (c). But assuming that the plaintiff was the servant of the defendants, this declaration alleges that the defendants and their servants *improperly* dropped the instrument which struck the deceased. That implies a want of ordinary care and skill on the part of the defendants' servants, for the consequences of which the defendants are responsible. *Hutchinson v. The York, Newcastle, and Berwick Railway Company* (d) is an express authority that a master is bound to take reasonable care to protect his servants from risk, by associating with them persons of ordinary care and skill.—He also referred to the "Piece Work Regulations" (e).

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Channell, Serjt., and *Prentice*, appeared to support the rule; but the Court said that, as at present advised, it was unnecessary to call upon them.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B.—This was an action brought by the plaintiff, as administratrix, to recover damages for the loss sustained by her in consequence of the death of her husband. It appeared that the deceased had been a workman employed under a subcontractor, at the Crystal Palace, to do work there. The death arose from the carelessness or

(a) 4 E. & B. 570.

(d) 5 Exch. 343.

(b) 9 Exch. 223.

(e) Ante, p. 833.

(c) 4 Metcalfe's Amer. Rep. 40.

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negligence of another workman engaged in doing business for the defendants, who were the general contractors for the whole, under whom the subcontractor, whose servant the deceased was, had been engaged to perform a definite portion of the whole contract. The jury found that the deceased was so employed by the subcontractor, and not directly by the defendants.

We think that this question must be determined in favour of the defendants, and that a nonsuit must be entered. The true principle is, in our opinion, to be found in the case of *Hutchinson v. The Newcastle, York, & Berwick Railway Company* (a), and it is this—that a master is not in general responsible to one servant for an injury occasioned to him by the negligence of a fellow servant whilst they are acting in one common service. And the reason for it in another part of the same judgment is stated to be, that the servant undertakes, as between him and the master, to run all ordinary risks of the service, including the risk of negligence of the other servants engaged in discharging the work of their common employer. Here both the servants were, at the time of the injury, engaged in doing the common work of the contractors, the defendants; and we think that the sub-contractor and all his servants must be considered as being, for this purpose, the servants of the defendants whilst engaged in doing work, each devoting his attention to the work necessary for the completion of the whole, and working together for that purpose. We should not give full or reasonable effect to the principle which governs such cases, (and which, as stated in *Priestly v. Fowler*, mainly arose from the enormous inconveniences which would ensue from holding the common employer to be liable in such circumstances,) if we were not to extend it as far as the present question. Here the workman comes into the place to do work knowingly and avowedly with

(a) 5 Exch. 343.

others. The workman, as was suggested in *Priestly v. Fowler*, may, if he thinks fit, decline any service in which he apprehends injury to himself; and in cases in which danger is to be apprehended he is just as likely, probably more so, to be acquainted with the risks he runs, than the common employer would be. If we were to hold the defendants liable, we should be obliged to hold that every contractor, where various tradesmen, bricklayers, plumbers, and the like are employed to build a house, would be liable for all accidents inter se to the various workmen so employed in the common object, and it is difficult to see that it could stop there,—possibly the common employer of them all might be made liable in such cases. If, indeed, there were any ground for holding that the person or persons whose act caused the death of the plaintiff's husband were persons not of ordinary skill and care, the case would be different; for the defendants were bound to provide persons of ordinary skill and care; but there is no suggestion of this sort.

We think, therefore, that a nonsuit should be entered. The only liability is on the servants by whom the act was done, and not upon the defendants.

Rule absolute.

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TEEDE and BISHOP v. JOHNSON.

Declaration on a guarantee by defendant for payment of goods supplied by the plaintiffs to J.

Plea, that after J. became indebted to the plaintiffs, J. being also indebted to other persons, by an indenture between J. of the first part; E., and B (one of the plaintiffs), trustees, for themselves and the rest of the creditors, of the second part; and the several other persons whose names and seals were thereunto subscribed and set, being creditors of J., of the third part: after reciting that J. was indebted to the parties thereto of the second

and third parts, in the several sums set opposite to their names in the schedule thereunder written, which he was unable to pay in full: it was witnessed, that J. assigned all his estate and effects to the said trustees, upon trust to pay rateably and without preference to themselves and their partners, and the parties thereto of the third part, the sums set opposite their names in the schedule; and in consideration of the assignment, the several creditors, parties thereto of the second and third parts, released J. from all debts which they or their partners might have against J. up to the date thereof. Replication on equitable grounds: that B. executed the deed in his character of trustee, and not in his character of creditor, and that he did so merely for the purpose of declaring the trusts of the deed, and not with any intention of releasing the debt; that he did not sign or seal the schedule, nor was the debt of the plaintiffs contained therein; and that if the deed operated in law as a release, it was executed by mistake, and in ignorance that such would be its legal effect. On demurrer to the replication,—*Held*, first, that, the release being general in its terms, the execution of the deed by B. operated as an extinguishment of the debt due to the plaintiffs. Secondly, that the facts disclosed by the replication did not afford any answer to the plea on equitable grounds.

THE declaration stated, that, in consideration that the plaintiffs would give credit to one Jessop, the defendant guaranteed the payment to the plaintiffs of all goods they might from time to time deliver to Jessop amounting to 100*l.*; and that if Jessop should make default in payment for such goods within two months from the delivery thereof, the defendant would on demand pay the amount due.—*Averments*: that the plaintiffs sold and delivered to Jessop goods to an amount not exceeding 100*l.*; that Jessop made default in payment for the same within two months; that all things happened to entitle the plaintiffs to be paid by the defendant; and that after the expiration of the two months the plaintiffs demanded payment.—

Breach: nonpayment.

Plea.—That after Jessop became indebted to the plaintiffs, and after the price of the goods became payable, Jessop being also indebted to other persons, to wit, on &c., a certain indenture was made.—The plea then set out the indenture, which was between J. Jessop, of the first part; S. Edwards and J. Bishop (one of the plaintiffs) “trustees, for themselves and the rest of the creditors of J. Jessop, parties hereto, of the second part; and the several other persons whose names and seals are hereunto subscribed and set,

being respectively creditors of J. Jessop, of the third part." After reciting "that J. Jessop is indebted unto the parties hereto of the second and third parts in the several sums set opposite to their respective names in the schedule hereunder written, which he is unable to pay in full, and has therefore proposed and agreed to assign all his estate and effects unto the said trustees for the benefit of his creditors:" It was witnessed, that, in pursuance of the said agreement, &c., "J. Jessop doth by these presents bargain, sell, assign, transfer, and set over unto the said trustees, their executors, &c., all and every the stock in trade, goods, wares, merchandizes, household furniture, &c., and all other the personal estate and effects whatsoever and wheresoever of him the said J. Jessop," &c. : Habendum unto the said trustees, their executors, &c. absolutely : "Upon trust nevertheless to collect or receive, or sell and dispose of the hereby assigned premises and every part thereof &c., and out of the monies received to pay all costs relating to the trust, and in the next place to pay, retain, and satisfy, rateably and proportionably, and without any preference or privity to themselves, the said trustees and their partners, and the other persons parties hereto of the third part who shall execute these presents within six weeks from the date hereof, the several debts and sums set opposite to their names in the schedule hereto" &c.—The indenture lastly witnessed, "that, in consideration of the premises and of the assignment thereinbefore contained, the several creditors, parties hereto of the second and third parts, do and each of them doth acquit, release, and for ever discharge the said J. Jessop of and from all and all manner of debt, sum and sums of money, bills, bonds, note accounts, reckonings, judgments, executions, actions, suits, claims, and demands whatsoever, which they the said releasing parties, or any or either of them, their or any or either of their partner or partners now have or hereafter may have against the said J. Jessop, his

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executors, &c., for or in respect of any debt, transaction, matter or thing up to the day of the date hereof."—The indenture concluded by stating in the usual form that the parties had thereunto set their hands and seals: (then followed the schedule).—The plea then averred, that by the indenture J. Bishop released J. Jessop from the debt due from him to the plaintiffs, and that the release was still in force.—(The plaintiffs' debt was not mentioned in the schedule, which was signed and sealed by several of the creditors).

Replication on equitable grounds.—That J. Bishop was made party to the deed in two characters, namely, as trustee and as creditor; and that he executed the deed merely in his character of trustee, and not in his character of creditor; and that he did so merely for the purpose of accepting and declaring the trusts contained in the deed, and not with any intention of releasing any debt due to him, or any debt due to the plaintiffs jointly: that at the end of the deed there was, as appears from the plea, and in fact there was, a schedule containing a column headed "Creditors' Signatures," for the signatures of the creditors who should execute the deed; a column alongside of it, and headed "Seals," for the seals of such creditors as should execute the deed; and three other columns, headed "Amount of Debt," for containing in figures the amounts of the debts of such last-mentioned creditors: that though J. Bishop signed and executed the deed in his character of trustee, yet he did not sign in the column headed "Creditors' Signatures," nor did he seal in the column headed "Seals," nor was the amount of any debt due either to him or to the plaintiffs inserted or contained or expressed in the columns headed "Amount of Debt;" but he signed and sealed the deed on the parchment whereon the deed is written above the words "The schedule above referred to," and without there ever being stated in any way the amount of any debt as due to J. Bishop or to the plaintiffs; and by reason whereof it rea-

sonably and sufficiently appeared and appears on the face of the deed, that J. Bishop did not execute the deed like a creditor: that if the deed operates at law as a release of the debt due to the plaintiffs, it was executed by J. Bishop in error and by mistake, and in ignorance on his part that such would be the legal effect and operation of the deed: that J. Jessop was not induced to execute the deed by any promise by the plaintiffs, or either of them, that the debt due from him to the plaintiffs, or any part thereof, should be released.

Demurrer and joinder therein.

Bovill in support of the demurrer.—It is clear that one of several partners may release a debt: *Wallace v. Kelsall* (a), *Gordon v. Ellis* (b). Then, as a valid release has been executed by Bishop, the facts stated in the replication afford no answer on equitable grounds. [*Martin, B.*, referred to *Cocks v. Nash* (c), and *Brooks v. Stuart* (d).] The parties may have intended that those debts only should be released which were specified in the schedule, and opposite to which the creditors sealed and signed their names; but the question is not what they intended, but what they have in fact done. [*Alderson, B.*—It is not a good equitable replication, it only amounts to this, that, *rebus extantibus*, a Court of equity would reform the deed. *Bramwell, B.*—A Court of law can only interfere where a Court of equity would give unconditional relief; but in this case the plaintiffs might claim a dividend under the deed.] The plaintiffs having executed a general release, the defendant is entitled to the rights incident to such an execution; and if the plaintiffs have any equitable answer, they should apply to a Court of equity to reform the deed: *Graham v. Ackroyd* (e). It is doubtful, however, whether

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(a) 7 M. & W. 264.

(b) 7 Man. & G. 607.

(c) 9 Bing. 341.

(d) 9 A. & E. 854.

(e) 10 Hare, 192.

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a Court of equity would give relief. Where a person executed an indenture assigning to another all his interest in certain residuary estate, and it was subsequently discovered that the residuary estate consisted partly of a fund, the existence of which was unknown to either of the parties at the time of the execution of the indenture, it was nevertheless held that the fund in question passed: *Howkins v. Jackson* (a). Lord Cottenham, C., there says, "It may be true that the parties did not know of the property in question; and therefore, that in one sense it may be said not to be included; but there was no want of intention to deal with every thing by the deed, but only a lack of knowledge as to the existence of the particular fund." Here a deed has been executed, by which the debtor is deprived of all his property; and it is consistent with the objects of the deed, that the debtor should have a general release.

Hugh Hill contra.—It is conceded that the replication cannot be supported, since *Graham v. Ackroyd* (b) is an authority that the plaintiffs ought to have applied to a Court of equity to reform the deed. The question then depends on the plea. It is a well-established principle, that every deed must be construed according to the intention of the parties apparent on the face of it. Now, this deed recites that "Jessop was indebted to the parties thereto of the second and third parts in the several sums set opposite to their respective names in the schedule thereunder written." But the debt which is the subject of this action is not included in the schedule. Suppose a person was a creditor for two different sums, one of which only was inserted in the schedule, would the release operate on both? Where a deed recited that the defendant stood indebted to his creditors in the several sums set against their respective names, and that they had agreed to take 15s. in the pound

(a) 2 Mac. & G. 372.

(b) 10 Hare, 192.

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upon the whole of their debts, and thereupon the creditors, in consideration of the sum of 15s. in the pound paid to them before executing the release, did release the defendant from all manner of actions, debts, claims, and demands in law and equity, which they or any or either had against him, *or thereafter could, should, or might have*, by reason of anything from the beginning of the world to the date of the release, it was held that there was a release of nothing but the respective debts, and all actions and demands touching them; for the general words of the release had reference to the particular recital, and were governed by it: *Payler v. Homersham* (a). [*Martin*, B.—That case would have applied if this had been a release of the sums set opposite to the names of the parties, but the release is general in its terms.] The recital shews that it was only intended to apply to the debts mentioned in the schedule. [*Martin*, B.—There is nothing to limit its operation as in *Payler v. Homersham*. The release appears to have been deliberately framed for the purpose of extinguishing all the debts. *Bramwell*, B.—Would this deed have any operation unless it released all the debts?]

ALDERSON, B.—I am of opinion that the plea is good. It shews a general release of all debts due from Jessop to the creditors, parties of the second and third parts. Therefore, it released this debt. But then there is an equitable replication, that Bishop signed the deed as a trustee only, and not as a creditor. That replication was properly abandoned, because it discloses matter which can only be dealt with in a Court of equity, for a Court of law has no power to enforce anything which depends on a condition, and consequently an equitable replication must be such that a Court of equity would, under the circumstances, give unconditional relief.

(a) 4 M. & Sel. 423.

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MARTIN, B.—The replication is clearly bad, and the question depends on the true construction of the deed. No doubt the intention was, that all parties who were creditors and bound by the deed, should seal and sign their names in the schedule opposite to the sums for which they claimed to be creditors. But the release is not confined to the sums so set down. If it were, a creditor might have omitted his debt, and then the release would not have operated to discharge it. The right to maintain an action in respect of a debt affected by but not included in a deed of this description depends on a different principle, viz. that all parties ought to act fairly and honestly towards each other. In these cases, however, a jury are reluctant to find a person guilty of fraud. This deed is framed to avoid any difficulty of that kind, for it contains a general release, and the parties who executed it released every debt due at the time of the execution; therefore, even if the true amount of the debt were not inserted, it would be barred.

BRAMWELL, B.—I am of the same opinion.

Judgment for the defendant.

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RIDEAL v. FORT and Another.

Feb. 8.

DECLARATION.—For that the defendants converted to their own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods, that is to say, household furniture of the plaintiff. And also, for that the defendants detained from the plaintiff his goods and chattels, that is to say, his household furniture, &c.

No action will lie against a sheriff for taking in execution under a writ of *fi. fa.* the bedding and other excepted articles of an insolvent debtor, who has petitioned under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96; but if the goods are protected from seizure (and, *semble*, they are), the remedy is by application to the Court for an order on the sheriff to restore them.

Plea to first count.—That, before the said time when &c. in that count mentioned, a writ of our Lady the Queen, called a *fieri facias*, was issued out of the Court of Exchequer of Pleas at Westminster, directed to the sheriff of Lancashire.—The plea then set out the writ, which commanded the sheriff to levy 18*l.* 5*s.* 8*d.*, which the "Liverpool Tradesman's Loan Company" recovered by a judgment against the defendant in the Court of Passage of the borough of Liverpool, and upon which judgment the company obtained leave to issue execution out of the Court of Exchequer, by order of a judge. The plea then stated, that the writ was indorsed to levy 22*l.* 10*s.* 8*d.* and interest, and was delivered to the defendant R. Fort, who was sheriff of Lancashire, to be executed.—"By virtue of which writ, the defendant R. Fort, as such sheriff, and whilst the same was in force, and before the return thereof and within his bailiwick, at the said time when &c. in the first count mentioned, did then seize and take in execution the goods and chattels of the plaintiff for the purpose of levying the said monies so directed to be levied: *quæ sunt eadem*, &c."

There was a similar plea to the second count, concluding with an allegation that R. Fort, as such sheriff, "seized and took in execution and detained the goods and chattels of the plaintiff in the second count mentioned, for the purpose of levying the monies so directed to be levied."

Replication to plea to first count.—That, before the de-

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livery to the defendant R. Fort of the said writ to be executed, and before the committing by the said defendant of the said grievances, and after the passing and coming into operation of a certain Act of Parliament, made and passed &c. (5 & 6 Vict. c. 116), and of a certain other Act &c. (10 & 11 Vict. c. 102), a petition for protection from process by virtue of the said statutes was duly, and in all respects conformably to the said statutes, presented and filed by the plaintiff (he being then a person entitled to present the same according to the said statutes, and having resided elsewhere than within the district to which the jurisdiction of the said Court and the Commissioners thereof under the said aforesaid Acts was by the last-mentioned Act restricted) to the County Court of Lancashire holden at Manchester, within whose district the plaintiff had resided for six calendar months next immediately preceding the time of filing his said petition; and that thereupon the said Court gave a protection to the plaintiff from all process whatever, either against his person or property, of every description, and the said protection remained in force from thence up to, until, and after the committing of the grievances in the first count mentioned.—Averments: that the property of the plaintiff was at the said time when &c. vested in the assignees of his estate and effects according to the said statutes, save and except the goods and chattels in the plea mentioned to have been seized and taken by the defendant R. Fort, and in order to seize and take which the grievances in the first count mentioned were committed: that the goods and chattels were and consisted of bedding and other necessities of the plaintiff not exceeding, together with certain wearing apparel, working tools, and implements of the plaintiff, in the whole the value of 20*l.*, which had been duly excepted by the plaintiff in his petition from the operation of the said Acts, and the same with the values thereof respectively had been and were fully and truly described by the plaintiff in his schedule according to the

said Acts: that, at the time of the committing of the said grievances, the defendant R. Fort had notice and knowledge of all the premises in this replication aforesaid.

There was a similar replication to the plea to the second count.

Demurrer to each replication.—Joinders therein.

Welsby in support of the demurrer.—First, the goods in question were not protected from seizure under the writ of *fi. fa.* The only protection was in respect of the property vested in the assignees. The 5 & 6 Vict. c. 116, s. 1, enables any person not being a trader, or being a trader and owing less than 300*l.*, to present a petition for protection from process to the Court of Bankruptcy, and thereupon the court may give a protection to the petitioner from all process either against his person or property, which shall continue in force until the appearance of the petitioner in court; and upon the presentation of such petition all the estate and effects of the petitioner become vested in the official assignee. That Act was amended by the 7 & 8 Vict. c. 96, which provides that the property of the petitioner shall vest in the assignee or assignees for the time being by virtue of their appointment: sect. 4. The 9th section enacts, "That the wearing apparel, bedding, and other necessities of the petitioner and his family, and the working tools and implements of the petitioner, not exceeding in the whole the value of 20*l.*, may be excepted by the petitioner in his petition from the operation of the said recited Act and of this Act, and in such case shall be altogether excluded from the operation of the said Acts." Therefore the property in the excepted articles remains in the petitioner, and they are as much subject to seizure under a writ of *fi. fa.* as they were before the petition was presented.—Secondly, assuming that the excepted articles were protected, this action cannot be maintained, for the sheriff has merely acted in obedience to the writ. If liable

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at all, he can only be liable in an action on the case, charging him with seizing the goods maliciously and without reasonable and probable cause. Such is the law, not only as regards a sheriff, but also the plaintiff in an action. *Ewart v. Jones* (a) decided that trespass cannot be maintained against a creditor, who, without malice, sues out a writ of ca. sa. upon a judgment regularly obtained by him against his debtor after the debtor's discharge under the Irish Insolvent Debtors Act, 3 & 4 Vict. c. 107. The writ is not rendered illegal and void ab initio by the mere circumstance of the goods being protected from seizure. Protection of goods does not differ from privilege of the person; and in *Magnay v. Burt* (b) it was held that no action lies against a sheriff or his officer for arresting a party attending under a summons from a court, though it is alleged that the party was thereby privileged, and that the defendants knew the fact, and made the arrest maliciously. *Yearsley v. Heane* (c) is an authority that neither the plaintiff nor his attorney is liable in trespass for taking in execution a defendant who is protected under the Bankrupt Act, 5 & 6 Vict. c. 116, s. 4. The same principle applies here. It cannot be said that the sheriff has *wrongfully* deprived the plaintiff of his goods. The sheriff was not bound to notice the protection, his duty was to obey the writ: *Tarlton v. Fisher* (d).

J. Henderson contra.—The sheriff, having seized the goods with notice of their protection, is liable in this form of action. The 5 & 6 Vict. c. 116, s. 1, enables the court to order “a protection to the petitioner from all process whatever either against his person or his property of every description;” and upon the presentation of his petition all his estate and effects vest in the official assignee. By sec-

(a) 14 M. & W. 774.
 (b) 5 Q. B. 381.

(c) 14 M. & W. 322.
 (d) 2 Doug. 671.

tion 5, the protection may be from time to time renewed, until the final order for protection and distribution. By the 7 & 8 Vict. c. 96, s. 9, the legislature, from motives of policy or humanity, has allowed certain effects of the petitioner to be excepted from the operation of that Act. Those effects therefore do not vest in the assignees so as to be distributable amongst the creditors, but they are nevertheless within the order of protection from process. If not, this absurdity would follow, that though the legislature has said that the excepted articles shall not be taken by the general body of creditors, yet they might be taken by a single creditor. [*Alderson, B.*—It is not necessary for us to determine that question, but I am disposed to agree that the excepted articles are protected; but then the remedy is to apply to the Court to order the goods to be restored.] If the protection remains as to the excepted articles, the sheriff is liable in this form of action for wrongfully taking them. The 5 & 6 Vict. c. 116, s. 1, says not only that the protection shall continue in force, but “that all process shall be stayed.” [*Martin, B.*—The sheriff is ordered to levy on the defendant’s goods, and he is bound to do so; then how can he be liable to an action for obeying the order of the Court?] He has seized the goods with knowledge that the legislature has stayed the process. [*Alderson, B.*—How can the sheriff tell whether the excepted articles are really protected? It is both difficult and inconvenient to make the sheriff decide upon the meaning of an Act of Parliament.]

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Welsby was not called upon to reply.

ALDERSON, B.—The defendants are entitled to judgment. A writ is delivered to the sheriff commanding him to levy on the plaintiff’s goods. The sheriff has no means of knowing whether the goods are in fact protected from seizure; and if he acts in obedience to the writ, that is a sufficient

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defence to an action against him. It may be, that, if he wrongfully and maliciously seizes the goods, he is liable in an action on the case. Here however the only question is, whether the sheriff has a right to do what he has done; and in my opinion he had. I am by no means disposed to say that Mr. *Henderson's* argument on the first point is not correct. It may be, that the petitioner is entitled to a general protection for all his property up to the time of the final order; but, if so, he will have a protection for the excepted articles in a different form. If these goods are really excepted from the operation of the Acts, the proper course was to apply to the Court to order the sheriff to withdraw and restore them, not to bring an action against him for simply obeying the writ. If this action would lie, the Courts have been in fault in not introducing an exception into writs as to privileged persons and protected goods. That has never been done; and in all the cases of privilege, whether on the ground of the person being a member of the legislature, or having a duty to perform about the person of the Queen, or from any other cause, it has always been considered that the sheriff is justified if he obeys the commands of the writ, and that the privileged party must apply to the Court for his discharge. The same principle applies to goods which are protected.

MARTIN, B.—I am not aware of any case in which it has been held that an action is maintainable against a sheriff who has simply obeyed the directions of a writ. Indeed, it would be strange if a person who is bound to obey the orders of the Court was held responsible for acting in direct obedience to them. It is true, that in some cases of bankruptcy the sheriff has been held liable in trover for taking in execution the goods of the defendant, although he had no notice of the act of bankruptcy; but there, by reason of the legal relation of the act of bankruptcy, he was in fact seizing the goods of a different person than that mentioned in the

writ. But in this case what has the sheriff done? He is directed to levy on the goods of the plaintiff, and he does so. Then it is said that he is liable to an action by reason of that act. I concur that we are bound to give effect to the language of the legislature, and that if the Act made him responsible I should yield to it; but by analogy to similar cases we may give full effect to the Act, and do no injustice, by reading the words "and all process be stayed" as meaning that all process shall be stayed by authority of the Court out of which it issues. I decline to give any opinion as to whether the excepted articles are protected. Possibly the protection extends to all the goods; but my judgment proceeds on this broad ground, that no action will lie against a sheriff for seizing goods in obedience to a writ.

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BRAMWELL, B.—I am inclined to think that Mr. *Henderson* is right as to the first point. Upon presenting the petition, the court give to the petitioner a protection from all process against his person or property, and all his estate and effects vest in the assignee, to be dealt with as the Acts require. But then he is at liberty to except certain articles, so that they do not pass to the assignee; but it may be that the order for protection extends to them. It is not, however, necessary to decide that point. But assuming that these goods are protected, then comes the question whether the sheriff is liable to an action for seizing them. It would be a hard case if he were, and I am not sure that it might not prejudice the execution creditor. It seems to me that the validity of the order for protection is contingent on everything taking place as required by the 1st section of the 5 & 6 Vict. c. 116. Then suppose the petitioner is a trader owing more than 300*l.*, how is the sheriff to know that fact? Or suppose the sheriff refuses to levy because there is an order for protection, would he be liable to an action at the suit of the execution creditor, because,

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although there was in fact an order for protection, yet, the order being void, he ought to have seized? It is impossible for the sheriff to find out whether all the requisites of the statute have been complied with. Mr. *Henderson* says that there is a positive enactment that "all process shall be stayed;" but, upon looking at the two Acts, it will be found that it is not so. The provision in the first Act, that "all process be stayed," was nugatory, because, ipso facto, upon the presentation of the petition all the petitioner's property vested in the official assignee, and consequently there was nothing upon which the enactment could operate. The second Act says, certain articles may be "excepted from the operation" of those Acts. I may here observe, that there is an analogous case under the bankrupt law. The 113th section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, which provides that a bankrupt, if arrested, shall be discharged on producing his protection, imposes a penalty on any officer who shall detain him longer than is necessary for obtaining a copy of the protection. Does not that imply that the officer has a right to arrest? but if he detains he must pay the penalty.

Judgment for the defendant.

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IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer.)

TRUSCOTT v. THE MASTER & WARDENS of the MERCHANT
TAILORS' COMPANY.

Feb. 6.

THE declaration stated that the plaintiffs were possessed of a school-house and certain buildings and premises, in which were certain windows, to, into, and through which the plaintiffs were entitled to have the light and air come and enter, and the defendant, by causing to be erected, and by continuing, certain walls and buildings near to the said windows, walls, buildings, and premises of the plaintiffs, obstructed, hindered, and prevented the light and air from coming and entering to, into, and through the same, and in so ample and beneficial a manner as they should have done and otherwise would have done, and darkened and obscured the said windows, buildings, and premises of the plaintiffs, to the great injury, inconvenience, and annoyance of the plaintiffs in the use and enjoyment of the said windows, buildings, and premises, &c.

The custom of London, which enabled the owner of an ancient house to erect a new house on the old foundations to any height, and so obstruct the access of light through his neighbour's ancient windows, is abrogated by the 3rd section of the Prescriptive Act, 2 & 3 Will. 4, c. 71.

Plea.—That the said school-house, buildings, premises, and windows were and are in the city of London; and that in the city of London, from time whereof the memory of man is not to the contrary, there hath been and still is an ancient and laudable custom there used and approved of, that if any person or persons or body corporate has or have a messuage or house in the said city near or contiguous and adjoining to another ancient messuage or house, or the ancient foundations of another ancient messuage or house, in the said city, of another person or persons or body corporate, his or their neighbour there, and the windows or

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lights of such messuage or house as first aforesaid are looking fronting, or situate towards, upon, or over or against the said other ancient messuage or house, or ancient foundations of another ancient messuage or house, of such other person or persons or body corporate, his or their neighbour there, so being near, adjacent, contiguous, or adjoining, although such messuage or house as first aforesaid and the lights and windows thereof be or were ancient, yet such other person or persons or body corporate, his or their neighbour, being the owner or owners of such other ancient messuage or house or ancient foundations, so being near, adjacent, or adjoining, by and according to the custom of the said city, in the same city for all the time aforesaid used and approved, well and lawfully may, might, and has used at his or their will and pleasure, his or their said other messuage or house so being near, adjacent, or adjoining, by building to exalt or erect, or of new upon the said ancient foundations of such other messuage or house so being near, adjacent, or adjoining, to build or erect a new messuage or house, to such height as the said owner or owners shall please, against and opposite to the said lights and windows near or contiguous to such other messuage or house, and by means thereof to obscure and darken such windows or lights, unless there be or hath been some writing, instrument, or record of an agreement or restriction to the contrary thereof in that behalf. That, before and at the time of the alleged grievances, the defendant was seized and possessed of an ancient messuage and house, and the foundations of a certain ancient messuage and house in the city of London, near, adjacent, contiguous, and adjoining to the said school-house and buildings and premises of the plaintiffs, and towards which the said windows looked and fronted, and being so seised, and there being and having been no writing, instrument, or record of an agreement or restriction to the contrary thereof in that behalf, the defendants, before and at the time of the alleged grievances, according to the said

custom, exalted and erected his said ancient messuage and house, and of new upon the said ancient foundations built and erected a new messuage and house against and opposite to the said windows of the plaintiffs, and thereby a little and to a necessary and unavoidable extent obscured and darkened such windows: *quæ sunt eadem &c.*

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Replication.—That the said access and use of light and air to and from the school-house, buildings, and premises into and through the said windows, which access and use of light and air was so obstructed and injured by the defendant's acts, had been and was actually enjoyed with the said school-house, buildings, and premises as of right and without interruption by the respective occupiers of the school-house, buildings, and premises, for and during the full period of twenty years next before the commencement of this suit and before the said obstruction and injury; and that the said access and use of light and air was not, during the said twenty years or any part thereof enjoyed as aforesaid by or by reason of any consent or agreement expressly made or given for that purpose by deed or writing. And the plaintiffs at the said times when &c. were the occupiers of the said school-house, buildings, and premises.

Demurrer and joinder therein.

Montague Smith (Pulling with him) for the plaintiff in error (the defendant below).—This custom of the city of London, which is confirmed by statutes, and therefore has the force of an Act of Parliament, has not been abrogated by the Prescription Act, 2 & 3 Will. 4, c. 71, s. 3 (a). First,

(a) Enacts, "that when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years, without interruption, the right thereto shall be deemed absolute

and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

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it is not such a custom as is pointed at by that Act; and secondly, the custom, having the force of an Act of Parliament, cannot be abrogated without express words for that purpose. First, the judgment in the Court below proceeded on the authority of *The Salters Company v. Jay* (a), where the Court of Queen's Bench held that the custom was no longer a defence to an action for building so as to darken windows which had been enjoyed without interruption for twenty years; but on that case being cited in *Regina v. The Mayor of London* (b), Lord Denman, C. J., said "That case was not much considered. I myself thought there might have been more argument upon it than there was." The object of the Prescription Act was to lessen the evidence necessary to support the right, not to abrogate adverse rights. These two rights existed before that Act passed. The owner of an ancient house had a right to the free access of light and air, and the owner of an adjacent house had a right to build a new house on the ancient foundations to any height. The former right was not destroyed by the latter; it existed as an independent right, though its enjoyment might be interfered with by the exercise of the custom. In *Moseley v. Bull*, cited and recognised in *Hughes v. Keme* (c), a custom alleged in the city of York to stop lights by building on new foundations where no house was before, was adjudged void. That shews that these two rights are not repugnant, for otherwise this custom would not have been affirmed: *Plummer v. Bentham* (d), *Wynstanley v. Lees* (e). In a note to *Aldred's case* (f) it is said, "Where a particular prescription or custom is pleaded, another prescription or custom repugnant to it cannot be replied without traversing the former prescription or custom: 1 Roll. Ab. 566, *Russell & Broker's*

(a) 3 Q. B. 109.

(b) 13 Q. B. 1.

(c) Yelv. 215; 1 Bulst. 115 nom
Hughes v. Keymish; Godbolt, 183,

nom *Hughes and Keene's case*.

(d) 1 Burr. 248.

(e) 2 Swanst. 333.

(f) 9 Rep. 59.

case (a), *Murgatroid v. Law* (b), *Spooner v. Day* (c). But a prescription or custom may be pleaded in answer to another without a traverse, where the latter is not inconsistent with but merely a qualification of the former: *Kenchin v. Knight* (d), *Parkin v. Radcliffe* (e), Bac. Ab. "Custom," H. In point of title, the two rights may co-exist, though, in point of interest, the one may interfere with the other. In Sir H. Calthrop's report of the case of *Hughes v. Keene* (f), it is said that it was resolved, "that the customs of London will not enable a man to erect a new house upon a void space of ground, whereby the ancient lights of an old house are stopped up; for the first owner of the old house having possession of a lawful easement and profit, which hath been belonging unto the house by prescription, time out of mind of man, may not be prescribed out of it by another *thwarting* custom which hath been used time out of mind of man, but the latter custom shall rather be adjudged to be void, and prescription against a prescription will never be allowed by the law; . . . that if the new house be only erected upon the ancient foundation, without any enlargement either in longitude or latitude, howsoever it be made so high that it stoppeth up the lights of the old house, yet he is not subject unto any action, because the law authoriseth a man to build as high as he may upon an ancient foundation." [Coleridge, J.—What meaning could the legislature have had by the introduction of the words "any local usage or custom to the contrary notwithstanding."] They have reference to local usages and customs affecting the mode of acquiring the right, for instance, there might be a custom in a manor that ancient windows should be presented by a jury, or that the right should not be acquired until a certain period after notice

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(a) 2 Leon. 269; 3 Leon. 218.

(b) Carth. 117.

(c) Cro. Car. 432; W. Jones,

375.

(d) 1 Wils. 253; 1 W. Black.
49.

(e) 1 Bos. & P. 283.

(f) Calthrop, 41.

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had been given to a neighbour. The Act does not affect customs such as that of the city of London for persons, who have occasion to erect or pull down any building near a public way, to put up a hoarding so as to obstruct or inclose the way: *Bradbee v. Governors of Christ's Hospital* (a). [Cresswell, J.—The 3rd section uses the word *indefeasible*: how can it be indefeasible if it is liable to be defeated?] The right itself may be indefeasible, though subject to interruption from the custom.—Secondly, this custom, having the force of an Act of Parliament, cannot be abrogated without express words for that purpose. The customs of London have been confirmed by various statutes from the time of Magna Charta, 9 Hen. 3, down to the 2 W. & M. Sess. 1, c. 8, s. 3. In *The City of London case* (b), the Court said, "There are divers customs in London which are against common right and the rule of the common law, and yet they are allowed in our books, and *eo potius*, because they have not only the force of a custom, but are also supported and fortified by authority of Parliament." In *Appleton v. Stoughton* (c), a custom of London to carry on a trade to which a person had not been apprenticed was held good against the statute 5 Eliz. c. 4, s. 3. [Williams, J.—That case was overruled by *Rex v. Kilderby* (d).] Sir O. Bridgman, in his judgment in *Hutchins v. Player* (e), says, "The statutes 6 Edw. 3, cc. 1, 2; 25 Edw. 3, c. 2; 27 Edw. 3, c. 11, provide 'that every man may sell merchandise or things vendible in any city in gross or by retail; and that every statute, charter, letters patent, usage, allowance, or judgment to the contrary shall be void,' and yet this did not take away the particular custom of London. No more do the Statutes of Mortmain take away the custom of London to devise in mortmain." *Rex v. Pugh* (f) is also

(a) 4 Man. & G. 714.

(b) 8 Rep. 125 b.

(c) Cro. Car. 516.

(d) 1 Saund. 310.

(e) O. Bridgman's Judgments,
 p. 319.

(f) 1 Doug. 188.

an authority that a statute does not abrogate a custom unless express words are used for that purpose.

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Bovill (*Thrupp* with him) for the defendants in error (the plaintiffs below).—It has not been shewn to what the words “any local usage or custom notwithstanding” can apply, except to the customs of London and York. The 9 Hen. 3, is merely a legislative declaration, that the city of London shall have its customs as theretofore used. This right is not pleaded as existing by statute, but by custom. The language of the 3rd section of the Prescription Act differs from that of the 1st and 2nd. As regards those sections, no doubt the object of the legislature was to lessen the evidence necessary to support the right; but it is otherwise with the 3rd section. The 1st section, which relates to claims to right of common and other profits a prendre, enacts, that no such claims shall, after thirty years enjoyment, be defeated by shewing that it was first enjoyed prior to that time, and that, after sixty years enjoyment, the right shall be deemed absolute and indefeasible. The 2nd section, which relates to claims of right of way or other easements, uses similar language, the periods of limitation being twenty years and forty years. The 3rd section does not say that the right to light, after twenty years enjoyment, shall not be defeated, but that it “shall be deemed absolute and indefeasible.” If the enactment had stopped there, it would have repealed any statute giving the same right as is claimed by this custom, and a fortiori the custom; but to prevent any doubt with respect to the customs of London and York, the legislature goes on to say, “any local usage or custom to the contrary notwithstanding.” Some effect must be given to those words, and none other can be given than that which is now contended for. The 19 Car. 2, c. 3, s. 12, did limit the custom; for it prohibited the building of houses of a certain class to a height exceeding four stories. *The Salters Company v. Jay* (a), is a

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direct authority on the point. There all the Judges agreed that there is no ambiguity in the enactment, and that it has reference to the customs of London. The doctrine laid down in *The Salters Company v. Jay* was not only affirmed but extended by the case of *Regina v. The Mayor of London (a)*, where it was held, that general affirmative words in a statute abrogated a custom of London. In Sugden on the Real Property Statutes, p. 172, it is said, that "the 3rd section, as to light, excludes by its general provision the custom of London. The learned author cites *The Salters Company v. Jay*, but never expresses any doubt as to its correctness. This very case was before the Master of the Rolls, who said that he entertained no doubt about it. If the right claimed by this custom were given by statute, the Prescription Act, being negative in its terms, would repeal it. In 1 Blac. Com. p. 89, it is said, "Where the common law and a statute differ, the common law gives place to the statute, and an old statute gives place to a new one." There the distinction is pointed out between a negative and an affirmative statute. Where the subsequent statute is negative in its terms, or its matter is so clearly repugnant that it necessarily implies a negative, it repeals the former statute; but where both Acts are merely affirmative, and the substance such that they may both stand together, they have a concurrent efficacy: *Ree v. Borton (b)*, Co. Litt. 115. a., Id. Harg. & Butl. ed. n. 8. In the course of the argument in the case of *The Mayor of London v. Regina (c)*, Alderson, B., said, "The words 'negative' and 'affirmative' statutes mean nothing. The question is, whether they are repugnant or not to that which before existed. That may be more easily shewn when the statute is negative than when it is affirmative, but the question is the same." Here the custom and the statute are repugnant. *Grisling v. Wood (d)*, and *No-*

(a) 13 Q. B. 1.

(b) 12 Ad. & E. 470.

(c) 13 Q. B. 33, n. (d).

(d) Cro. Eliz. 85.

ble v. Durell (a), are authorities that a custom cannot prevail against a statute. Where the customs of London are intended to be preserved, express words are used for that purpose, as in the Statute of Distributions, 22 & 23 Car. 2, c. 10, s. 14. This custom and the right to light cannot co-exist.

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Montague Smith, in reply, referred to Com. Dig. "Parliament," (R) (N).

COLERIDGE, J.—In this case the Court of Exchequer gave judgment for the plaintiffs below, without argument, on the authority of *The Salters Company v. Jay* (b). This proceeding is for the purpose of reviewing that decision, which is admitted to be in point; and therefore the only question is, whether that case was rightly decided. That depends on the construction of the 3rd section of the Prescription Act, which is addressed merely to the access of light. That section seems to me to simplify and almost new-found the mode of acquiring the right to access of light. It founds it on actual enjoyment for the full period of twenty years without interruption, unless that enjoyment is shewn to have been by consent or agreement expressly made by deed or writing—thus putting the right on a simple foundation, and with the simplest exception. Suppose the section had rested there, and that the custom of London was in force, there would then have been one mode of acquiring the right throughout England; but that mode would not have existed in London; for though there might have been an actual enjoyment of light for the prescribed period, with an absence of consent by deed or writing, yet the right would not be acquired, because a neighbour might put an end to it by building a new house on an old foundation. I cannot enter into the refinement of *Mr. Smith's*

(a) 3 T. R. 271.

(b) 3 Q. B. 109.

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argument, that the right exists but not the enjoyment. The question is, whether the custom is still to prevail? The cases relied on as to the implied repeal of a former statute by a subsequent negative statute would have applied here; but in this section there is something more—viz a non obstante clause. However, in all those cases, the argument, in whatever technical language it is expressed, has always been, what is the intention of the legislature to be gathered from the Act itself. If it appears to be the intention that the latter Act should repeal the former, then that intention must prevail. Now, applying that to the present case, can we give full effect to the words of this Act of Parliament, without putting an end to the custom? Mr. *Smith* has very properly admitted, that, if the words had been “any local usage and custom of London or York to the contrary notwithstanding,” the effect would have been to abrogate this custom, though sanctioned by an Act of Parliament. We asked, what meaning had the legislature by the introduction of the words “any local usage or custom to the contrary notwithstanding,” unless they have reference to the customs of London and York; but no satisfactory answer has been given. Upon the short ground, that we should fail to give effect to the Act of Parliament unless we construe it as abrogating the custom, the judgment of the Court below must be affirmed.

CRESSWELL, J.—I am of the same opinion. In the course of legislation then and since, Parliament has been actuated by a desire to settle titles and rights. One object of the Prescription Act was to shorten the time by which persons who had the access and use of light could acquire an absolute right to it. The 3rd section does not say “when the access and use of light shall have been enjoyed *as of right*,” because every person has a right to so much light as can come in at his windows. It is true that his neighbour has a right thus far, that, within twenty years

he may build upon his own land and obstruct the access of light—he does no wrong, for within the period of limitation the other party has no right to have his windows unobstructed. The Prescription Act brought this to a simple question. It says, that after twenty years enjoyment without interruption, the right shall be deemed *absolute and indefeasible*. But, it is not so if another person has a right to obstruct the light—it is interruptable. Coupling the words “absolute and indefeasible” with what follows, “any local usage or custom to the contrary notwithstanding,” it is equivalent to saying that the right shall be absolute, and shall not be defeated by the existence of any local usage or custom. It points to the very case now before the Court. I cannot conceive stronger negative words in a statute. They must mean to take away local usages and customs existing somewhere; and why take away the customs of York or other places rather than those of London? It is argued, that, because the customs of London are confirmed by Act of Parliament, they are not abrogated by this Act. But the true meaning of that is, that they shall not be questioned on account of any supposed illegality, but shall be taken to be good and valid customs.

WILLIAMS, J.—I am of the same opinion. The case of *The Salters' Company v. Jay* is decisive; and I agree with what was there said by the members of the Court, though it is true no authorities were cited on the argument. To-day many have been cited, the most important of which is the judgment of Sir *Orlando Bridgman* in *Hutchins v. Player* (a), which I think is good law, and establishes this proposition—that if the enactment in question had stopped before it came to the non obstante clause, it would not have abrogated the custom of London. Notwithstanding the ingenuity which has been bestowed on this case, nothing has

(a) O. Bridgman's Judgments, p. 319.

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been suggested that will satisfy that clause, except such a custom as this. The Legislature, for some reason or other, has put the right to light on a different footing from the easements acquired under the Act. It confers, as a consequence of twenty years enjoyment without interruption, an absolute and indefeasible right without regard to circumstances, notwithstanding the adjoining premises may have been in the occupation of a lessee. If that is any hardship, the remedy is to get the statute altered.

CROMPTON, J.—I am of the same opinion. No doubt the Legislature had this very custom in mind when they made the provision in question. It must mean some custom which interfered with the access and use of light, and it was well known that there were such customs in London and York. The only suggestion is, that the provision applies to some fancied custom—such as that there should be a presentment by a jury, or that notice should be given to a neighbour; but there is no trace of the existence of any such customs. There is no reason to suppose that the Legislature did not mean such a custom as this, and it comes within the very words of the Act. Then it is said that the customs of London are parliamentary rights; but they are, nevertheless, customs. The only effect of sanctioning them by statute is, that they are to be treated as good customs. The Legislature did not mean to give parliamentary rights to the city of London, but only that the customs should be good *qua* customs, as sanctioned to that extent by the Legislature.

CROWDER, J.—I am not able to comprehend how the existence of a right, which, after enjoyment for twenty years, is to be deemed absolute and indefeasible, can co-exist with the alleged right set up by this custom. The light might not only be interfered with, but entirely destroyed, so far as regards the use and enjoyment of it, by an act done under

the custom. I am disposed to think, that, if the language of the 3rd section had stopped without the non obstante clause, still this custom could not prevail, because it would be a custom inconsistent with and repugnant to the positive language of the enactment. But all doubt is removed by the words "any local usage or custom to the contrary notwithstanding." Nothing has been suggested to which these words can apply. I think that they must embrace this custom of London and York, or any other town.

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Judgment affirmed.

SMART v. THE GUARDIANS OF THE POOR OF THE
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THIS was an appeal under the 34th section of the Common Law Procedure Act, 1854, against a rule absolute, made by the Court of Exchequer, to enter a nonsuit (a).

Held, in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that guardians of the poor are not liable to pay the salary of a collector of poor rate appointed by them in pursuance of an order of the Poor Law Commissioners.

Raymond for the plaintiff (b).—Assuming that the appointment of the plaintiff as collector of poor rate was valid, though not under seal (c), the defendants are liable to pay his salary. First, it is objected, that the guardians only acted ministerially; but that circumstance does not exonerate them. By the 4 & 5 Will. 4, c. 76, s. 15, guardians must always act under the orders of the Poor Law Commissioners, and, therefore, if that objection prevails, they

(a) See the case, 10 Exch. 867.

(b) Before *Coleridge, J., Cresswell, J., Crompton, J., Williams, J., Crowder, J.*

(c) *Harcourt* for the defend-

ants admitted, for the purposes of the argument, that an appointment under seal was not necessary.

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never could be liable. There are, however, instances in which they have been held responsible: *Moon v. The Guardians of Witney Union* (a), *Sanders v. St. Neot's Union* (b). The 46th section of that Act empowers the Poor Law Commissioners to direct the guardians to appoint paid officers, and it provides, that "their salaries shall be chargeable upon and payable out of the poor rates of such parish or union, &c., in the manner and proportions fixed by the Commissioners, and shall be recoverable against the overseers or guardians of such parish or union, by all such ways and means as the salaries of assistant overseers or other paid officers of any parish or union are recoverable by law." It having been decided in the case of *Regina v. The Poor Law Commissioners, Re Cambridge Union* (c), that, where the Commissioners form several parishes into a union, but not for the purpose of rating, they have no power under that section to order the appointment of a collector of poor rates, the 2 & 3 Vict. c. 84, was passed, which rendered such orders valid. The 7 & 8 Vict. c. 101, s. 62, enables the Poor Law Commissioners to direct the guardians to appoint a paid collector of poor rates; and by sect. 63, the overseers are subject to a penalty for wilfully neglecting to make or collect sufficient rates. The 23rd section of the 4 & 5 Will. 4, c. 76, which relates to the building of workhouses, shews, that though the guardians act under the order and direction of the Commissioners, they do not act ministerially. It is clear from the 49th and 108th sections, that the guardians may make valid contracts.—Secondly, it is objected that the fact of the appointment does not create any contract by the guardians to pay the salary. But as a general rule, if a person appoints another to do certain work, and there is no stipulation as to payment, the law will imply a promise, by the person so appointing, to pay. In *Nowell v. The Corporation of*

(a) 3 Bing. N. C. 814. (b) 8 Q. B. 810. (c) 9 A. & E. 911.

Worcester (a), a Local Board of Health was held liable on a contract made by them, notwithstanding the Public Health Act, 11 & 12 Vict. c. 63, s. 140, provides, that the members of the board shall not be personally responsible, and that the expense incurred by them shall be paid out of the rates. The guardians have the means of repaying themselves by ordering the overseers to make a rate.

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Harcourt appeared for the defendants, but was not called upon to argue.

COLERIDGE, J.—We are all of opinion that this case was rightly decided in the Court below. The question is, whether there is any contract, by virtue of which the guardians are liable to pay the plaintiff. The onus of establishing that is cast upon the plaintiff. It appears that the guardians were directed by the Poor Law Commissioners to appoint a collector of poor rate. The guardians appointed the plaintiff, who was to be paid by a poundage on the sums collected, and his appointment was sanctioned by the Poor Law Commissioners, at the poundage proposed. The plaintiff acted as collector. Then do those circumstances afford any evidence of a contract between the parties? It is argued that the guardians are liable by mere force of the appointment. But it would lead to dangerous consequences if every person who, by virtue of an office which he filled, was directed to appoint another person to an office with a salary, was liable to pay that salary. The doctrine as to implied contracts cannot be carried to that extent. It is said, that the guardians have the means of procuring funds by which they can repay themselves, but that circumstance does not raise any implied contract to pay. Therefore, without going further into the case, it appears to us, upon principle, that there is no right of action.

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CRESSWELL, J.—Even if there is a difficulty in the plaintiff's getting this money, that is no reason for holding that a transaction is a contract which is not a contract. If so, I do not know where we should stop. The defendants merely made the appointment in pursuance of the order of the Poor Law Commissioners, and there was no implied contract on their part to pay the salary.

Judgment affirmed.

Feb. 6.

GLYNN v. THOMAS.

A declaration alleged that the plaintiff held certain premises as tenant thereof to the defendant, and that the defendant wrongfully distrained upon the said premises certain goods of the plaintiff, as a distress for alleged arrears of rent, to wit, the sum of 6*l.* 3*s.* by the defendant then pretended to be due and in arrear; and the defendant wrongfully remained in possession of the

THIS was a proceeding in error on the judgment of the Court of Exchequer in the case of *Thomas v. Glynn*.

The first count of the declaration stated that the plaintiff held a certain messuage, tenement, and premises as tenant thereof to the defendant at and under a certain rent; and that the defendant distrained divers goods of the plaintiff when no rent was due.—The second count stated that the defendant, on &c., wrongfully distrained upon the said tenements and premises divers other goods of the plaintiff, to wit, &c. (describing them) of great value as a distress for the alleged arrears of rent, to wit, the sum of 6*l.* 3*s.*, by the defendant then pretended to be due and in arrear to him from the plaintiffs for the said tenements and premises. And the defendant wrongfully remained in possession of the said goods under colour of the said distress, until the plaintiff afterwards, to wit, on the day and year aforesaid, was said goods under colour of the said distress until the plaintiff was compelled to pay, and did pay, to the defendant the pretended arrears of rent and costs of the distress, in order to regain possession of the goods: whereas, in truth, a small part only, to wit, 1*l.* 16*s.* 9*d.*, of the said pretended arrears was due:—*Held*, in the Exchequer Chamber, that the count disclosed no cause of action, for, as the distress was lawful, the defendant was entitled to a tender of the amount really due, and upon his refusal to accept that sum, the plaintiff's course was to replevy the goods: *Crompton, J.*, dissentiente.

compelled to pay and did pay to the defendant the said pretended arrears of rent, and a further sum, to wit, 5s. 6d. for the costs and charges of the said distress, in order to regain possession of the said goods: whereas, in truth, at the time of the making of the said distress and during all the time aforesaid, a small part only, to wit, 1l. 16s. 9d. of the said pretended arrears was due or in arrear to the defendant for or in respect of the said tenements and premises: Whereby and by reason of the premises the plaintiff and his family were during all the time aforesaid greatly annoyed and disturbed in the peaceable possession of the said premises.

Plea: not guilty.—Upon which issue was joined.

The cause was tried before *Martin*, B., at the Middlesex Sittings after Hilary Term, 1855, when a verdict was found for the defendant on the first count, and for the plaintiff on the second count, with 4l. 6s. 4d. damages. Judgment having been entered up accordingly, the plaintiff took proceedings in error, and the case was argued in Easter vacation, 1855 (a), (May 10), by

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Bovill for the plaintiff in error (the defendant below).—The second count is bad. *Tancred v. Leyland* (b) decided that no action will lie for taking goods as a distress for rent upon a claim of a greater amount being due than was in fact due; nor for selling the goods for the alleged arrears, unless more goods were sold than were necessary to satisfy the actual arrears and costs. That case was followed by *Stevenson v. Newnham* (c), where the count alleged that the defendants *maliciously* distrained for more rent than was really due; and it was nevertheless held that the count was bad, for an act which does not amount to a legal injury cannot be actionable because it is done with a bad

(a) Before *Coleridge*, J., *Maule*, J., *Wightman*, J., *Erle*, J., *Williams*, J., *Crompton*, J., and *Crowder*, J.
(b) 16 Q. B. 669.
(c) 13 C. B. 285.

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intent. This count charges, first, the wrongful distraining for an alleged arrear of rent greater than the amount actually due; and secondly, the wrongful remaining in possession until the plaintiff was compelled to pay the pretended arrears and costs. It is admitted on the face of the count that *some* rent was due; and there is no allegation that an unreasonable quantity of goods were taken so as to constitute an excessive distress. There was therefore nothing unlawful in the distress. Then does the remaining in possession until the arrears of rent were paid give any cause of action. [*Martin*, B.—At the trial it was contended that this might be treated as an informal count for money had and received, since the money was paid under compulsion.] This was a voluntary payment. In *Knibbs v. Hall* (a) Lord *Kenyon* ruled, that where a party threatened with a distress for rent pays money, against the payment of which he might have defended himself, but does not do so, that is not a payment by compulsion. *Skeate v. Beale* (b) is also an authority that a payment under duress of goods is not a compulsory payment. *Gulliver v. Cosens* (c) decided that where cattle are distrained damage feasant, the owner cannot, without tendering amends, pay under protest an excessive sum demanded for damage, and recover the amount as money had and received to his use. That decision was founded on the rule of law laid down by Lord *Coke* in *The Six Carpenters' case* (d) and on the authority of *Lindon v. Hooper* (e). The same principle applies to the case of a distress for rent. In order to render the detainer unlawful, the plaintiff should have tendered the amount really due. [*Crompton*, J.—It was never meant to be decided that if any damage resulted from the distress upon a claim of more than was due, the party could not maintain an action. *Tancred v. Leyland* (f) only goes to this extent, that the

(a) 1 Esp. 84.

(d) 8 Rep. 147.

(b) 11 A. & E. 983.

(e) 1 Cowp. 414.

(c) 1 C. B. 788.

(f) 16 Q. B. 669.

mere taking or selling on an untrue claim is not actionable; but the Court there say, that if the claim was followed by any special damage, there would be a right of action.] The plaintiff was not bound to pay the amount claimed, he might have replevied the goods. It is consistent with this declaration that the defendant took goods of the value of 5s., and kept them until the plaintiff paid the amount claimed.

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Pigott for the defendant in error (the plaintiff below).—The second count discloses a good cause of action. After verdict every intendment will be made in favour of the count. The allegation that the plaintiff was “compelled to pay,” may mean that he was compelled in consequence of being unable to obtain sureties in a replevin bond for the amount distrained for, although he could have done so for the amount really due. Therefore, on the authority of *Tancred v. Leyland*, this count is maintainable, and it may also be supported as a count for money had and received. [Erle, J.—*Tancred v. Leyland* shews that there is no duty on the part of a landlord to inform the tenant of the amount for which he distrains, and that the latter has no cause of complaint until he has performed his duty by tendering the rent due. Maule, J.—In *Brown v. M’Kinally* (a), Lord Kenyon ruled that where a party sued on a claim which he knows to be unfounded, pays it, although at the time of payment he protests against it, and declares his intention to bring an action to recover back the money so paid, yet no action will lie, for he ought to have defended the action brought against him.] It is conceded that where the payment is voluntary the money cannot be recovered back, but that is not so here. *Lindon v. Hooper* (b) was the case of a distress of cattle damage feasant, and the Court considered that the action for money had and received was not

(a) 1 Esp. 270.

(b) 1 Cowp. 414.

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adapted to try a right of common. There the owner of the cattle had a remedy by replevin: here, as some rent was due, the plaintiff could not have successfully replevied the goods. The same observation applies to *Anscomb v. Shore* (a). In *Gulliver v. Cosens* (b) the judgment of *Tindal*, C. J., proceeds entirely on the consideration "upon which of the parties has the law cast the onus of estimating the amount of damage done." *Ashmole v. Wainwright* (c) is an authority that an action for money had and received will lie to recover money paid on the wrongful detainer of goods. The same principle was acted on in *Parker v. The Great Western Railway Company* (d). This count shews all that is necessary to entitle the plaintiff to recover back the money which the defendant holds against equity and conscience.

Bovill in reply.—The distinction between *Ashmole v. Wainwright*, *Parker v. The Great Western Railway Company*, and the cases relied on, is pointed out by *Tindal*, C. J., in *Gulliver v. Cosens*, viz. that the former are "cases where the law made it incumbent on the defendant correctly to ascertain the amount of his demand." It is well established that money paid by compulsion of law or with full knowledge of the facts is not recoverable: 2 Smith's Lead. Cas. 327, 4th edit., *Hamlet v. Richardson* (e). The plaintiff should have tendered the amount due, and then he would have had a right of action for the wrongful detainer.

Cur. adv. vult.

The judgment of the Court was now delivered by

COLERIDGE, J.—The question in this case arises in error

(a) 1 Taunt. 261.

(d) 7 Man. & G. 253.

(b) 1 C. B. 788.

(e) 9 Bing. 644.

(c) 2 Q. B. 837.

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from the Court of Exchequer, upon the sufficiency of the second count of the declaration after verdict for the plaintiff. The count commences with alleging a wrongful distraining of the plaintiff's goods as a distress for alleged arrears of rent, to wit, the sum of 6*l.* 3*s.* pretended to be due and in arrear: that the defendant wrongfully remained in possession of the goods under colour of the said distress, until the plaintiff was compelled to pay, and did pay, the said pretended arrears and 5*s.* 6*d.* for the charges of the distress, in order to regain possession of the goods: whereas, in truth, during all the time aforesaid, only a small part, to wit, 1*l.* 16*s.* 9*d.* of the pretended arrears was in arrear: and during all the time aforesaid by reason of the premises the plaintiff and his family were greatly annoyed in the peaceable possession of his premises.

For the plaintiff in error the case mainly relied on was *Tancred v. Leyland* in error (a); and that case decided that the merely taking goods in distress on a claim of more rent being in arrear than was in fact in arrear, and selling them on such claim, was not actionable; the first, because the distrainer for rent is not bound by the amount for which he claims to distrain, and though he takes, alleging that he does so for an amount exceeding the real arrears, he may sell afterwards only for that which is really due; the second, because from a mere allegation that the distrainer sold for the alleged arrears and costs, it is not to be inferred that he sold more than was necessary to raise the amount of the arrears actually due. In the same judgment it was stated to be clear law, as undoubtedly it is, that if the untrue claim had been followed by a sale of more of the goods taken than was sufficient to raise the amount of rent really in arrear, with legal charges, a sufficient cause of action would have arisen.

The count before us shews *a taking* of goods, not alleged

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to be more than sufficient to cover the real arrears with the charges, but on an untrue claim of larger arrears than were due: it does not go on to allege a sale of more than would cover the real arrears with costs, but it alleges what it asserts to be a compulsory payment of those larger supposed arrears, in order to regain possession of the goods distrained, of which the defendant remained in possession until such payment.

The question therefore is, whether this allegation is equivalent in effect to an allegation of a sale of the goods by the defendant for more than the rent really due. If the payment of the money is to be considered voluntary, as it was clearly made with a full knowledge of the facts, it cannot be contended, that a right of action can be grounded on it. In *Sells v. Hoare* (a), it is true that a rule was refused to disturb a verdict for 1s. where goods taken under a distress had not been sold in consequence of an arrangement between the parties, but there the action was for an excessive distress, and an excessive distress was proved; there was therefore a good right of action, and it may well be that the arrangement coming subsequently, the circumstances of which are not stated, may not have defeated that right of action, and the plaintiff only recovered 1s. This therefore does not interfere with the general and well known rule. It is alleged, however, in the count before us, that the plaintiff was compelled to make it, and did make it, in order to regain possession of his goods; and this allegation, being taken to be true, we must assume now such a state of facts as would have proved it, if put in issue. But the facts necessary for that purpose would be merely that the plaintiff demanded the goods, and that the defendant refused to deliver them unless the alleged arrears with the charges of the distress were paid, and that the payment was made in consequence. Still this would not make the de-

(a) 1 Bing. 401.

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mand extortionate, or the payment such as could be recovered back in this form of action, unless from these facts it followed that the detention of the goods became unlawful. Now as some rent was due, the taking was lawful; and as the taking was lawful, so was the detention until the sum really due, with enough to cover the lawful charges, was tendered.

This is not a case of excessive distress, nor a case in which the distrainer had sold the goods and so made a replevin impossible; it is consistent with every allegation in the declaration, that the proceedings of the defendant were perfectly *bonâ fide*, that he believed the sum he claimed to be the real amount of the arrears, and that the difference between him and the plaintiff was very trifling. Under these circumstances the defendant, whose proceedings were unquestionably lawful up to this point, was entitled to a tender of that amount which the plaintiff alleged was the sum really due; upon his refusal to accept that sum, the plaintiff's course was to procure the immediate possession of the goods by replevin, and to put the disputed question of amount in that course of settlement which the law prescribes for it. The principle on which *Lindon v. Hooper* (a) was decided is expressly in point, although that was a case in which the plaintiff's cattle had been distrained damage feasant, and not for rent in arrear; and *Lindon v. Hooper* was maintained and acted upon in the Court of Common Pleas in the case of *Gulliver v. Cosens* (b), in which all the prior authorities were carefully reviewed, and in which it was held that where cattle are distrained damage feasant and an exorbitant sum demanded for the damage, and the owner pays that sum under protest, but makes no tender of a sufficient sum, he cannot recover back the sum so paid as money had and received to his use. And in the same case, it was held further, that if he had tendered a sufficient sum

(a) 1 Cowp. 414.

(b) 1 C. B. 788.

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before the distress made, his remedy would have been replevin or trespass; if after the distress, but before impounding, detainue. The passage cited in that case from that of the *Six Carpenters* (a) is very important in this, because in it Lord Coke clearly puts tender of arrears of rent on the same footing with tender of amends, as applicable respectively to distress for rent in arrear and distress for damage feasant. In *Gulliver v. Cosens* the Court assumed the sum demanded for the damage to have been excessive, but laid it down that the plaintiff, being the original wrongdoer, was still bound to tender the sum which he alleged to be sufficient; and in the present case the plaintiff, for the same reason was equally bound to make the tender; he was in arrear with his rent, and therefore first in default: by law he must be taken to know the amount for which he was in arrear, and the landlord, when he distrains, is not bound to inform him. Although the cases are the same in principle, that which is before us is *à fortiori* in its circumstances, for here the plaintiff might have procured the immediate possession of his goods by replevin; and as the disputed question of amount might have been tried with perfect convenience on a plea in bar of tender as to the whole or part of the rent stated to be in arrear in the avowry, according as the smaller or the larger sum was avowed for, there is no ground for dispensing with a tender, or departure from the course which the law has prescribed for the settlement of such questions.

Nothing that we here lay down at all interferes with the many well known and established decisions, in which it has been held that where goods are unlawfully detained, or an injurious act is about to be done to them, or some act, which it was the duty of a party to do in respect of them, be refused to be done unless money be paid, and the money be paid under protest as the only means of avoiding the immediate injury which would result from the

(a) 8 Rep. 147.

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detainer, the injurious act, or the wrongful refusal, the money so paid may be recovered back. Those cases stand on a principle entirely distinct from the present, and quite reconcilable with it; in all of them will be found an unlawful act on the part of the defendant, and a necessity on the part of the plaintiff—he must pay, or he cannot have his goods, or they will be injured, or he will sustain damage by the defendant's refusal. This is simply the case of a landlord distraining, not excessively, for rent in arrear, and holding possession by virtue of that distress. Being so lawfully in possession, he demands a larger sum for arrears than the plaintiff admits to be due, but that alone does not make the distrainer unlawful; and the plaintiff must be taken to know that neither the validity of the distress or of the distrainer depends on that demand; and that if he wishes to make the latter unlawful, he should tender the sum which he alleges to be really due. It would be very inconvenient to hold, that without this, the tenant suffering no injury should be at liberty to pay the larger demand, and at any interval of time after within the statute of limitations bring his action to recover back the money so paid.

We therefore think that the judgment of the Court below must be reversed.

My Brother *Compton*, not being satisfied that the count is bad, and being disposed to think that it discloses a good cause of action, does not concur in this judgment.

Judgment reversed.

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Feb. 5.

LEE and Others, Assignees of PETERS, a Bankrupt,
v. HART (a).

A sale by a trader of his goods at prices considerably below their market value, is not of itself a fraudulent transfer within the 67th section of the Bankrupt Act, 12 & 13 Vict. c. 106. To render the transaction fraudulent within that Act, the seller must have intended by such sale to defeat or delay his creditors, and the purchaser must have had reason to know that such was the object of the seller.

Therefore, where a trader, from time to time, during several months sold his goods to the defendant at prices from 40% to 50% per cent. less than he paid for them, and afterwards became bankrupt—*Held*, in the Exchequer Chamber, that it was properly left to the jury to say whether the dealings between the defendant and the bankrupt were real sales by the bankrupt to the defendant, each endeavouring to make the best bargain he could for himself, and, if so, such sales were not an act of bankruptcy as fraudulent transfers.

ERROR on a bill of exceptions.—The action was trover by the assignees of one Peters, a bankrupt, for woollen cloths and other drapery goods. The first count of the declaration alleged a possession by Peters, and a conversion before the bankruptcy. The second count alleged a possession by the plaintiffs, as assignees, and a conversion after the bankruptcy.

Pleas—First: not guilty. Secondly, to the first count: that the goods were not the goods of Peters. Thirdly, to the second count: that the goods were not the goods of the plaintiffs, as such assignees.—Issues thereon.

The cause was tried before *Martin*, B., at the London Sittings, after Hilary Term, 1855; and the facts stated in the bill of exceptions (so far as material) are as follows:—

Peters, from September, 1853, up to the 15th of April, 1854, when he was adjudicated a bankrupt, carried on the business of a draper at Southampton. His business was a retail business in drapery goods of all descriptions, and he sometimes sold by wholesale to small traders in the neighbouring villages. The defendant carried on business in London as a wholesale “job draper,” and his business consisted chiefly of job transactions. He generally bought and sold goods for ready money. He first became acquainted with Peters on the 11th of November, 1853, by calling

(a) See the case 10 Exch. 555.

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upon him, in the same way as he had been accustomed to do on other parties for the last eighteen years; and when he first called on Peters, he asked him if he had anything to dispose of that was "jobbish." Between that time and the 1st of April, 1854, he had twenty-five transactions with Peters, in which Peters sold to him parcels of goods, and he paid Peters ready money for them. On each of these transactions an invoice of the goods was made out by Peters, and the defendant paid him the amount of these invoices, and took receipts from him at the time upon such invoices for the money so paid. Peters, who was a witness for the plaintiffs, stated on his cross-examination that he applied these monies, from time to time, in payment to his creditors, and not in making a purse for himself. The goods were chiefly procured by Peters from warehousemen or manufacturers carrying on business in London. They were usually sent to the defendant, addressed to him at London. The prices at which the goods were invoiced by Peters to the defendant were 40l. to 50l. per cent. below the prices at which Peters had bought them. There were nine transactions between Peters and the defendant previous to the 10th of January, 1854, and the amount of the invoices upon these transactions was 1,131l. 10s. 8d. In seven out of the twenty-five transactions, subsequent to the 10th of January, 1854, the invoices were made out, by the direction of the defendant, to a person of the name of Simeon, the defendant being the real purchaser. All the goods comprised in the twenty-five invoices came into the possession of the defendant in London.

The plaintiffs' counsel contended that there was evidence from which the jury might infer that the transactions between the defendant and Peters subsequent to the 10th of January, 1854, or some of them, were fraudulent transfers or fraudulent deliveries of the goods of Peters, made by him with intent to defeat or delay his creditors; and that such transactions, or some of them, were acts of bankruptcy.

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The learned Judge told the jury, that if the real and true nature of the transactions or dealings between Peters and the defendant was, that they were real sales from Peters to the defendant, the one bargaining for the price and the other for the goods, each endeavouring to do the best for himself,—Peters endeavouring to get the best price he could, and the defendant endeavouring to get the goods as cheap as he could; then the said sales were not nor was either of them acts of bankruptcy. The jury thereupon found a verdict for the defendant upon the third issue.

The plaintiffs' counsel having tendered a bill of exceptions to this ruling of the learned Judge, the case was argued in last Michaelmas Vacation (a) (Nov. 28), by

Cleasby (Collier with him) for the plaintiffs. — The learned Judge misdirected the jury. By the 67th section of the 12 & 13 Vict. c. 106, "If any trader liable to become bankrupt shall make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels, with intent to defeat or delay his creditors, he shall be deemed to have thereby committed an act of bankruptcy." Here there was evidence of a fraudulent transfer within the meaning of that enactment. If a trader makes such a disposition of his goods as must necessarily tend to defeat or delay his creditors, that is fraudulent and an act of bankruptcy. The word "transfer" in the 67th section does not imply any particular act of transfer, but is used in a general sense, and therefore includes a transfer by sale. In *Cook v. Caldecott* (b), Lord Tenterden, C. J., says, "A sale is a 'transfer,'" and therefore may come within the provisions of the statute as a "fraudulent transfer." [*Wightman*, J.—Suppose a trader sells his goods at an under-price for the purpose of paying an urgent creditor, how is

(a) Before *Wightman*, J., *Cresswell*, J., *Crompton*, J., and *Willes*, J.

(b) *Moo. & M.* 522.

that fraudulent?] The question does not depend on the intention of the trader at the time of the sale; if the necessary effect of the sale is to defeat or delay creditors, it is "fraudulent" within the Act. A conveyance by a trader of all his property in trust for the benefit of his creditors, is an act of bankruptcy, even though the conveyance be made bonâ fide: *Worseley v. Demattos* (a), *Tappenden v. Burgess* (b). That can only be on the ground that the trader by his act divests himself of the means of paying his creditors. [*Wightman*, J.—In the cases relied on, the purchaser was in some way or other connected with the fraud. Is there any authority, that where the transaction is bonâ fide so far as the purchaser is concerned, it is nevertheless fraudulent, because the trader sells considerably under prime cost?] There is no direct authority, but the selling at ruinously low prices must necessarily have the effect of defeating or delaying creditors, by depriving them of a portion of the fund out of which they ought to be paid. [*Willes*, J.—Suppose a rival in trade of an old established house sold goods at half price, could it be contended that that was an act of bankruptcy? *Cresswell*, J.—Or, suppose a trader paid an enormous discount in order to raise money to meet some pressing necessity?] If a trader voluntarily makes a transfer which must of necessity lead to the delay and disappointment of his creditors, such a transfer is an act of bankruptcy, because every person must be taken to intend that which is the necessary consequence of his own act: *Young v. Waud* (c), *Graham v. Chapman* (d), *Ramsbottom v. Lewis* (e). It should have been left to the jury to say whether these transactions were not such a dealing by the bankrupt with his property as necessarily have the effect of defeating or delaying his creditors. But the attention of the jury was merely

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(a) 1 Burr. 467.

(d) 12 C. B. 85.

(b) 4 East, 230.

(e) 1 Camp. 279.

(c) 8 Exch. 221.

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directed to the question whether these transactions were real sales. For the reasons given by Lord *Mansfield*, C. J., in *Worseley v. Demattos* (a), the word "fraudulent" in the bankrupt law does not import mala fides. If there can be a real sale, which is nevertheless a fraudulent transfer, the direction of the learned Judge was wrong; and it is not difficult to put such a case. Suppose the trader was in difficulties and about to abscond with the money, and the purchaser knew that fact, but nevertheless bought the goods, such a sale, though real, would be a fraudulent transfer.

Gray for the defendant.—A real sale is not an act of bankruptcy. It is not a fraudulent "gift, delivery, or transfer" within the meaning of the 12 & 13 Vict. c. 106, s. 67. A "gift" means the handing over of goods to another without consideration. A "delivery" means the depositing of goods with another, not to become his property but to hold for the benefit of the bankrupt. A "transfer" means a fraudulent transfer to a particular creditor in preference to the others. The word "sale" is not found in the statute. A trader has a right to sell his goods provided the sale is real. If, indeed, he intends to favour the buyer, or sells at an under-price in order to acquire some benefit for himself, the transaction may be an act of bankruptcy. But here the bankrupt, being the unquestionable owner of the goods, sells them to the defendant for the best price he can obtain. But, assuming that a real sale may, under certain circumstances, be an act of bankruptcy, in this case there was no such evidence. In *Cook v. Caldecott* (b), Lord *Tenterden*, C. J., said, "I think that a sale cannot in reason be held to be a fraudulent transfer, unless it takes place under such circumstances that the buyer, as a man of business and understanding, ought to suspect and believe that the seller means by it to get

(a) 1 Burr. 467.

(b) Moo. & M. 522.

money for himself in fraud of his creditors, and that the sale is made for that purpose." Here there was no evidence of an intention on the part of the bankrupt to run away with the money. The intent is only immaterial where the trader parts with the whole of his property, and so immediately disables himself from paying his creditors. There is no authority for the proposition, that, because a trader sells his goods under circumstances which may ultimately lead to bankruptcy, the transfer is fraudulent. If so, no person could safely purchase goods at a price below their market value. In *Lee v. Hart* (a), Parke, B., says, "If a trader sells goods at a less price than they are worth, and makes a practice of it, though it is obvious that such a practice must *ultimately* end in bankruptcy, none of such sales, simply as such, constitutes an act of bankruptcy; and even where the trader intended, on a particular sale, to run away with the price and cheat his creditors, such sale is not an act of bankruptcy." Here the bankrupt sold the goods to raise money to pay his creditors. In *Devas v. Venables* (b) there was evidence that the bankrupts were making a purse for themselves. Moreover, whatever might have been the bankrupt's intention, there was no evidence that the defendant was aware of it, nor were the transactions of such a nature that the defendant must necessarily have known that the bankrupt intended to defeat his creditors.

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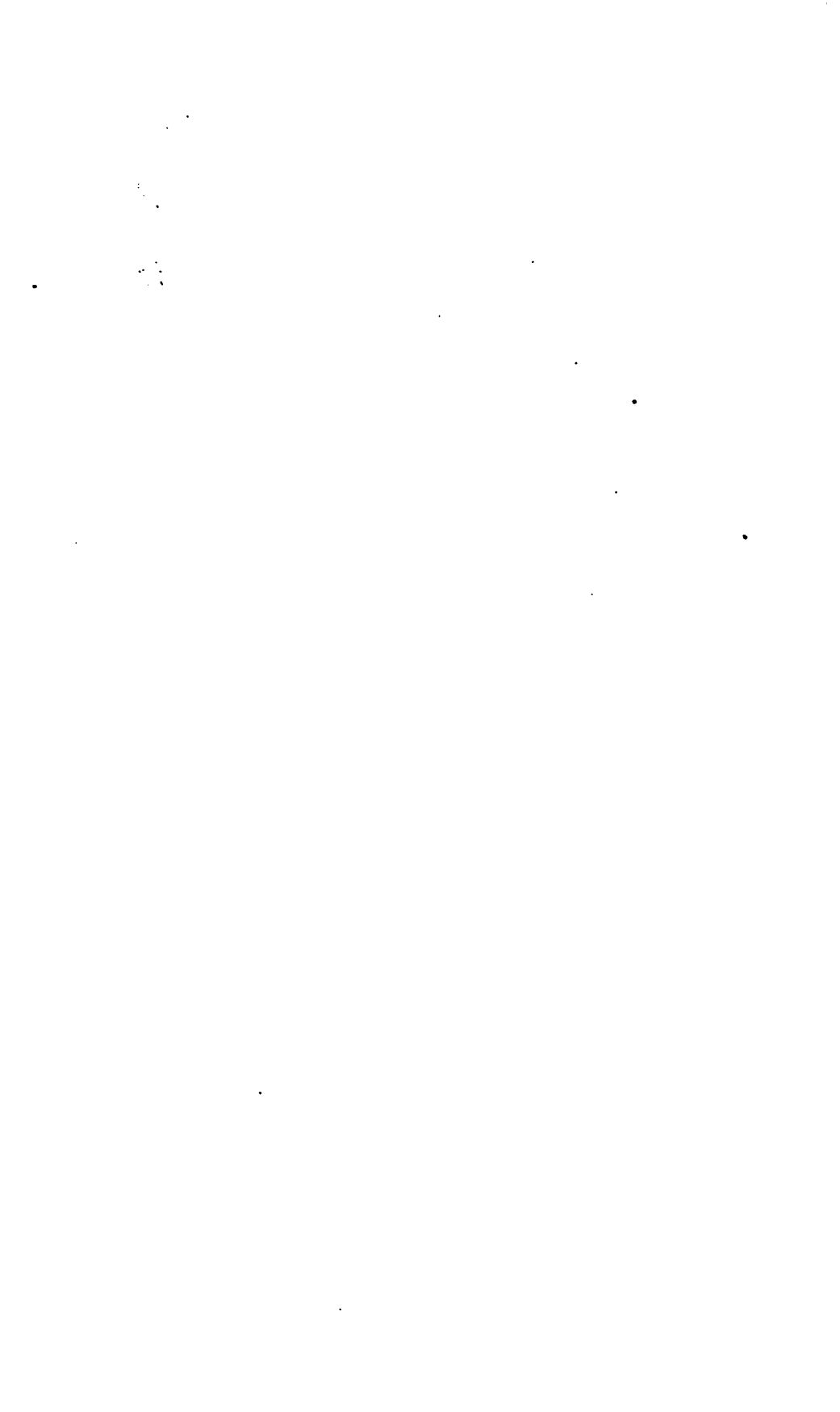
Cur. adv. vult.

The judgment of the Court was now delivered by

WIGHTMAN, J.—We are of opinion, that the direction of the Judge to the jury in this case was correct; and that, if the jury were of opinion, upon the evidence before them, that the dealings between the defendant and the bankrupt,

(a) 10 Exch. 555.

(b) 3 Bing. N. C. 400.



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(1).

To set aside Judgment by default.

On an application to set aside a judgment signed in default of appearance under the 27th section of the Common Law Procedure Act, 1852, an affidavit stating the precise

nature of the defence, is not required, but the ordinary affidavit of merits is sufficient.—Per *Parke*, B., and *Platt*, B.; *Pollock*, C. B., dubitante; *Martin*, B., dissentiente.

An affidavit in answer to such affidavit ought not to be allowed.—Per *Pollock*, C. B., and *Platt*, B.; *Parke*, B., and *Martin*, B., contra. *Warrington v. Leake*, 304

AGREEMENT.

See LANDLORD AND TENANT, (2), (3).

Not to carry on Business within a certain District.

By agreement between the plaintiff, a solicitor, and the defendant, after reciting that the plaintiff, being manager of certain estates at T., and finding it expedient to establish an office there for the transaction of law and other business, had proposed to appoint the defendant as resident clerk there, it was agreed, that the defendant should reside at T.; and that, in consideration of his services, the plaintiff should pay him a certain salary; and that either party might determine the agree-

ment by a certain notice; and that the defendant would not, for the space of twenty-one years, notwithstanding the decease of the plaintiff, reside in the parish of T., or within twenty-one miles thereof, or carry on therein or within the distance aforesaid, during the period of twenty-one years, any business of the description of that carried on under the agreement:—*Held*, per *Pollock*, C. B., *Alderson*, B., and *Platt*, B., that the restriction was not unreasonable and was good in law; per *Martin*, B., that the agreement was valid, for if the restriction as to residence was void, that as to not carrying on business was good.

A declaration on the above agreement alleged as a breach, that, after its determination, the defendant resided in the parish of T., and during the said period of twenty-one years carried on business in the said parish of the description of that carried on under the agreement.—Plea to first breach: that, although the defendant resided in the parish of T., yet he did not so reside for the purpose or with the intention of carrying on business of the description of that carried on under the agreement:—

Held, that, whether the allegation in the declaration was to be read as one or two distinct breaches, the plea was bad. *Dendy v. Henderson*,

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ALIEN ENEMY.

A declaration stated, that S., who carried on business at Odessa, had given the plaintiff an order for goods, to be delivered by the plaintiff to a carrier to be forwarded for shipment; and thereupon, in consideration that the plaintiff would execute such order, and would pay the defendants one and a quarter per cent. on the invoice price of the goods, and would permit the defendant to debit S. with

the price of the goods, and would deliver the carrier's receipt for the goods to the defendants, the defendants promised the plaintiff to accept his draft at four months date for the invoice amount of the goods, on the plaintiff's delivering to the defendants the carrier's receipt.—Averment of performance of conditions precedent.—Breach: non-acceptance by the defendants of the plaintiff's draft:—Plea: that S., at the time of the agreement, was an alien, resident at Odessa in the empire of Russia; and that, after the making of the agreement, and before any breach by the defendants, and before and at the time when the plaintiff was to have dispatched the goods in execution of the order, S. became, and still is, an enemy of the Queen; by reason whereof, the plaintiff could not lawfully dispatch the goods to S. in execution of the said order.—Replication: that, in the declaration of war against the Emperor of Russia, her Majesty waived her right of seizing enemies' property on board a neutral vessel; and by an Order in Council, it was ordered, that Russian merchant vessels, in any ports or places in her Majesty's dominions, should be allowed six weeks for loading their cargoes and departing; and that such Russian merchant vessels, if met at sea by any of her Majesty's ships, should be permitted to continue their voyage, if, upon examination of their papers, it should appear that their cargoes were taken on board before the expiration of the above period.—Averments, that the goods in the declaration mentioned were, long before the expiration of the said space of six weeks, delivered by the plaintiff to the carrier to be forwarded for shipment, and the same could have been shipped, pursuant to the Order in Council, within the said space of six weeks. On

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demurrer to the replication:—*Held*, that the plaintiff was entitled to judgment; for, assuming that the declaration of war would, of itself, have made it illegal for the plaintiff to send the goods to an enemy, they might have been lawfully shipped within the period mentioned in the Order in Council.

Semble: Per *Martin*, B., that, even if there had been no Order in Council, the plaintiff might have lawfully shipped the goods. *Clemons v. Blessig*, 135

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(1). *After Reference to Arbitration.*

Where a cause is referred to arbitration without power of amendment, a Judge has no power, except by consent of the parties, to order the particulars of demand specially indorsed on the writ to be altered, by increasing the amount of one of the items. *Morgan v. Tarte*, 82

(2). *After Judgment and Proceedings in Error.*

Under the 22nd section of "The Common Law Procedure Act, 1852," amendments may be made after judgment and commencement of proceedings in error; and since, by the 155th section of that Act, the record is not removed into the Court of error until the day of its sitting, the application should be made to the Court below. *Wilkinson v. Sharland*, 33

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ATTORNEY'S BILL.

Delivery to Party to be charged therewith.

A bill of costs, signed by the attorney and headed in the matter of business, but not addressed to any one, was inclosed in an envelope and sent by post to the client:—*Held*, a sufficient delivery of the bill to the party to be charged therewith, within the 6 & 7 Vict. c. 73, s. 37. *Roberts, App.*; *Lucas, Resp.*, 41

AUDITOR.

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BANKING COPARTNERSHIP.

The directors of a joint-stock bank issued instruments in the following form:—"Union Bank Post Bill—

At sixty days after sight of this our first bill of exchange (second and third of the same tenor and date not paid), We promise to pay, on account of the proprietors of the Union Bank of Calcutta, to the order of C. L. & Co., the sum of company's rupees ten thousand. Value received. (Signed), J. R., W. G., directors." By their deed of settlement, the business of the company was to consist in issuing promissory notes, payable to bearer on demand, for any sum not less than eight company's rupees, and not exceeding one thousand, and bills of exchange payable, at such time after date or sight as the directors should fix, to parties who should require the same and deposit the amount of such bills in the bank, and in all other branches of business usually transacted by bankers in Calcutta. It was also provided, that no promissory notes or bills of exchange should be issued otherwise than of the description and in the manner above mentioned. In an action by an indorsee of the above instrument against a shareholder in the bank:—*Held*, first, that the directors had power to bind the shareholders by issuing instruments of that description; secondly, that they were in a form which bound the shareholders; thirdly, that they were substantially made in the name of the partnership firm.

Semble, that such instruments may be declared on, either as promissory notes or bills of exchange. *Forbes v. Marshall*, 166

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(1). *Protection during Suspension of Certificate.*

The protection from arrest granted to a bankrupt during the suspension

of his certificate, does not protect him from arrest in respect of debts contracted since his bankruptcy. *Grace v. Bishop*, 424

(2). *Assignment for Benefit of Creditors.*

In October, 1852, E., a trader, assigned to the plaintiff all his household furniture and effects then on his premises, as a security for money lent, with a power, in default of payment, to seize and take possession of the property thereby assigned, and all other goods, chattels, and effects which might be found on the premises. In January, 1855, E. assigned all his estate and effects to trustees, for the benefit of his creditors. In the following February, the plaintiff seized the goods, &c., then on the premises of E.; and in March a fiat in bankruptcy issued against E., the act of bankruptcy being the above assignment of his estate and effects to trustees. In an action by the plaintiff against the assignees for selling the goods so seized by him:—*Held*, that though the assignment by E. of his estate and effects to trustees was void as against creditors, yet it operated to transfer to the assignees the property not included in the assignment to the plaintiff, and so defeated his title, which would otherwise have been valid by the seizure. *Carr v. Accrington*, 566

(3). *Fraudulent Preference.*

Payment by a trader, who contemplates bankruptcy, of a debt not then due, upon a bona fide request of the creditor, is not in law a voluntary payment; the fact of the debt not being due is merely a circumstance for the jury in considering the question of fraudulent preference. *Strachan v. Barton*, 647

(4). *Fraudulent Transfer.*

A sale by a trader of his goods at prices considerably below their market value, is not of itself a fraudulent transfer within the 67th section of the Bankrupt Act, 12 & 13 Vict. c. 106. To render the transaction fraudulent within that Act, the seller must have intended by such sale to defeat or delay his creditors, and the purchaser must have had reason to know that such was the object of the seller.

Therefore, where a trader, from time to time, during several months sold his goods to the defendant at prices from 40% to 50% per cent. less than he paid for them, and afterwards became bankrupt—*Held*, in the Exchequer Chamber, that it was properly left to the jury to say whether the dealings between the defendant and the bankrupt were real sales by the bankrupt to the defendant, each endeavouring to make the best bargain he could for himself; and, if so, such sales were not an act of bankruptcy as fraudulent transfers. *Lee v. Hart*, 880

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SUMMARY PROCEDURE ON BILLS OF EXCHANGE ACT.

Parol Acceptance of Foreign Bill.

The defendant's agent at Cameroons in Africa made and delivered to the plaintiff an instrument in the form of a foreign bill of exchange, payable *at sight*. The bill was not addressed to any one, but across it the defendant's agent wrote the

word "accepted," and the defendant's name and address. The plaintiff presented the bill to the defendant, and requested its payment, when the defendant denied that he owed the amount, but admitted the signature to be that of his agent. The plaintiff then said, "As you acknowledge the signature, you had better pay the bill." The defendant replied, "I'll pay the bill, but I cannot pay it now: I'll give you a bill at three months." The plaintiff then said, "There is something suspicious about it; it is almost a forgery; you had better pay it at once." The defendant replied, "I'll pay the bill; I cannot pay it now, but I will give my note or bill for it at three months:"—*Held*, in the Exchequer Chamber (assuming the instrument to be a bill of exchange), that there was no evidence of an acceptance of it. *Reynolds v. Peto*, 418

BILL OF LADING.

See CARRIER, (4).

BOND.

See COMMON LAW PROCEDURE ACTS, (4), 2.

(1). *Illegal Contract.*

The resignation for a pecuniary consideration of the position of major in a regiment in the East India Company's service is illegal by the 49 Geo. 3, c. 126, s. 4, and security for the payment of the money is void: Per *Pollock*, C. B., *Alderson*, B., and *Martin*, B.; *Platt*, B., dubitante. *Græme v. Wroughton*, 146

(2). *Liability of Surety.*

The defendant as surety became bound to the guardians of a poor law union by bond, conditioned (*inter alia*) that the treasurer of the union should discharge the duties of

his office "by receiving all monies tendered to be paid to the board of guardians, &c., by paying out of the monies in his hands of the guardians all orders on him drawn on their behalf," and that he should pay over to the guardians all *balances*, monies, &c. due to the union. The treasurer, who was a cornfactor, had extensive dealings in corn and open accounts in trade with the overseers of several of the townships. No money was received from these townships, but it was the practice of the treasurer to debit the overseers in his trade account with the amount of poor rate ordered by the guardians to be paid; and then to debit himself with the amount as paid to him as treasurer. His accounts were audited half-yearly, and the credits in corn were allowed by the auditors as payments in money. At the last audit the auditors found 239*l.* 1*s.* 10*d.* was due from him to the guardians:—*Held*, that the defendant was liable for that amount, inasmuch as it was a "*balance*" ascertained and settled by the auditors. *The Guardians of the Poor of the Belford Union v. Pattison*, 623

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See *VENDOR AND VENDEE*, (1).

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See *EXECUTION*, (2).

CARRIER.

(1). *Packed Parcels and Enclosures.*

A railway company cannot legally charge a greater sum for the carriage of a package containing several parcels belonging to different persons, than for a package containing several parcels all belonging to one person.

Where a railway company refused to carry, at the ordinary rate, packed parcels tendered by a carrier, whereby he was obliged to send them by a more circuitous route and at a greater expense:—*Held*, that he was not entitled to recover damages for an alleged loss of business.

Semble, that the 14th section of the Great Northern Railway Company's Act, 13 & 14 Vict. c. lxi., which provides that the Company may charge for the carriage of parcels not exceeding five hundred weight any sum they may think fit, means any "*reasonable sum*." *Crouch v. The Great Northern Railway Company*, 742

(2). *Damage by Act of God.*

The defendants, who were common carriers, contracted with the plaintiff to carry his goods between Gosport and Ryde. The goods were put in a boat, and towed by a steam vessel of the defendants, which proceeded to Portsmouth pier to take in passengers. There was another vessel of the defendants' alongside the pier; and it was the usual and most safe course for the steam boat so approaching to stop until the other vessel had left. On this occasion the steam boat with the boat in tow was twice stopped, in consequence of the stopping of the other vessel, and on the second time of stopping the tide lifted up the tow-boat and pitched it on the rudder of the steam-boat, whereby the tow-boat sprung a leak, and the plaintiff's goods were damaged. There was no negligence on the part of the captains of either vessel:—*Held*, that the damage was not caused by the act of God, and therefore the defendants were liable. *Oakley v. The Portsmouth and Ryde Steam Packet Company*, 618

(3). *Damage by Fire.*

The plaintiff delivered, at the station of the Great Western Railway Company at Bath, a van-load of furniture, to be conveyed to Torquay. He signed a receipt note, which was headed—"Bath Station.—To the Great Western Railway Company.—Received the under-mentioned goods, on the conditions stated on the other side, to be sent to Torquay station, and delivered to the plaintiff or his agent." One condition was, that the Company would not be answerable for loss or damage by fire. Another condition stated, that the Company would not be responsible for loss or damage to goods beyond the limits of their railway. The van was placed on a truck and conveyed to Bristol, where the Great Western line ends, and the defendants' (the Bristol and Exeter) line begins. The same truck and guard proceeded with the van to Exeter, where the defendants' line ends, and is joined by the line of the South Devon Company, which runs to Torquay. Whilst the van and furniture were at the defendants' station at Exeter, they were accidentally destroyed by fire:—*Held*, that this was *one* contract with the Great Western Railway Company for the conveyance of the van and furniture from Bristol to Torquay, subject to the conditions of the receipt note, and that, consequently, none of the Companies were responsible for the loss. *Collins v. The Bristol and Exeter Railway Company*, 790

(4). *Damage by Sulphuric Acid.*

The plaintiffs chartered the defendant's vessel for a voyage from Glasgow to Colombo. The plaintiffs sent on board the vessel some cambric goods, and they agreed with M. & Co. for freight to carry goods

for them. M. & Co. shipped a quantity of sulphuric acid, which was stowed by the defendant near the plaintiffs' goods. The master signed and delivered to the plaintiffs bills of lading for the goods and acid. It was alleged to be the duty and custom of merchants, who shipped sulphuric acid, to give notice of the same to the shipowner. No notice was given to the defendant. In the course of the voyage the sulphuric acid leaked and damaged the plaintiffs' goods. In an action by the plaintiffs on the bill of lading, for not delivering the goods in good condition:—*Held*, first, that the neglect of the plaintiffs to give notice of the shipment of the sulphuric acid was no excuse for the defendant's breach of contract, since it was only a remote cause of the damage, the proximate cause being the act of the defendant in placing the acid where it was; and that, even if the declaration had been on the charter-party, and it had contained an agreement to inform the defendant when sulphuric acid was shipped, and the plaintiffs had actually shipped it, the defendant would nevertheless have been liable: Secondly, that there was no defence on the ground of avoiding circuity of action, since the damages which the defendant would recover in an action against the plaintiffs for omitting to give notice of the shipment of the sulphuric acid, would not necessarily be the same as the plaintiffs would recover against the defendant. *Alston v. Herring*, 822

CATTLEGATE.

See *GAME*, (1), (2).

CERTIFICATE.

See *SPECIAL JURY*.

CHARTERPARTY.

See CARRIER, (4).

(1). *Custom at Port of Loading.*

By charterparty the defendant agreed to load on board a vessel at Trinidad "a full and complete cargo of sugar, molasses, ^{and} or other produce." It appears that it was the custom at Trinidad to load sugar in hogsheads, and molasses in puncheons, in which mode they were carried more conveniently and with less loss to the merchant; and that a full and complete cargo of sugar and molasses meant a cargo so packed:—*Held*, on appeal in the Exchequer Chamber (affirming the judgment of the Court below) that the custom was admissible in evidence; for it was applicable to such a charterparty, and did not control, but only explained the contract, which ought to be construed with reference to the usage at the port of lading: also that the custom was reasonable and good in law. *Cuthbert v. Cumming*, 405

(2). *Seaworthiness.*

If a chartered vessel is seaworthy at the commencement of the voyage, but is afterwards damaged by perils of the sea, though the owner is not bound to repair the vessel, yet if he elects not to do so, he ought not to proceed with the vessel in an unseaworthy condition.

A declaration on a charterparty (which contained an exception of "all unavoidable hindrances, dangers, and accidents of the seas") alleged as a breach, that, although after the commencement of the voyage the vessel was damaged by the dangers and accidents of the seas, and was unseaworthy, and was in a place where she could have been repaired, of all which the defendant

then had notice, yet the defendant did not cause the vessel to be repaired, and carelessly and negligently caused the vessel to proceed on her voyage in an unseaworthy state, and by reason of the premises the vessel was unable to meet the perils of the sea, and a large quantity of the plaintiff's goods was obliged to be thrown overboard:—*Plea*, that at the commencement of the voyage the vessel was tight, staunch, and strong, and every way fitted for the same, and was seaworthy:—*Held*, on demurrer, that the breach disclosed a good cause of action, and that the plea afforded no answer to it. *Worms v. Storey*, 427

(3). *Exception of Restraints of Princes and Rulers.*

The plaintiff and defendant agreed by charterparty that the plaintiff's ship should, after discharging her outward cargo, proceed to Galatz or Ibralia, as ordered at Constantinople by charterer's agents, and there receive a full cargo of wheat; and being so loaded, should therewith proceed to Cork for orders to discharge at a safe port in the United Kingdom, and deliver the same agreeable to bills of lading, and so end the voyage (restraints of princes and rulers, the dangers of the seas, &c., during the said voyage, always mutually excepted). The vessel, after discharging her outward cargo, proceeded to Constantinople; and, in consequence of orders there given by the defendant's agent, the master took the vessel to Ibralia. Before her arrival there, a proclamation had been promulgated by the Russians, who had invaded Wallachia, prohibiting the exportation of wheat:—*Held*, first, that the exception of the restraint of princes and rulers applied whilst the vessel was at Ibralia; secondly, that a copy of a

printed placard, with the name of the Russian commander attached to it, and posted on the walls of Ibralia, was admissible as evidence of the prohibition. *Bruce v. Nicolopulo*, 129

CIRCUITY OF ACTION.

See CARRIER, (4).

COASTING VESSEL.

See RAMSGATE HARBOUR ACT.

COLLECTOR OF POOR RATE.

See POOR.

COMMON LAW PROCEDURE ACTS.

See AFFIDAVIT.

AMENDMENT, (2).

COSTS, (4), (5).

INSPECTION OF DOCUMENTS.

PLEADING, (3).

RELEASE.

(1). *Concurrent Writ of Summons.*

Under the Common Law Procedure Act, 1852, a concurrent writ of summons can only be issued within six months from the time of issuing the original writ.

Where a writ of summons has been issued before that Act came into operation, and has been duly continued up to that time, the first renewal under that Act is quasi the original writ.

The Court will judicially notice the seal on a notarial certificate verifying an affidavit sworn before a magistrate abroad. *Cole v. Sherard*, 482

(2). *Discovery.*

An application for a discovery of documents under the 50th section of the Common Law Procedure Act, 1854, must be made upon the affidavit of a party to the cause.

Under the 51st section of that

Act a party cannot interrogate as to the contents of written documents. *Herschfeld v. Clarke*, 712

(3). *Interrogatories.*

1. The affidavit in support of an application by a plaintiff for leave to deliver interrogatories to the defendant, under the 52nd section of the Common Law Procedure Act, 1854, must shew that he has a good cause of action upon the merits; and, therefore, in an action of ejectment by reason of the forfeiture of a lease by breach of a covenant to insure, an affidavit, which merely stated that the plaintiff believed that "there was a good cause of action for the breach of covenant above mentioned," was held insufficient, inasmuch as by a waiver of the forfeiture the plaintiff's right to maintain ejectment would be gone. *May v. Hawkins*, 210

2. The 51st section of the Common Law Procedure Act, 1854, which enables the parties to a cause to deliver interrogatories upon any matter as to which discovery may be sought, applies to actions of ejectment.

Under that section a defendant in ejectment is entitled to interrogate the plaintiff as to the character in which he sues, and the nature of the pedigree on which he relies. *Flitcroft v. Fletcher*, 543

(4). *Garnishment.*

1. C., at the request of D., commenced an action (in which C. had no interest) against I., upon D. giving C. a bond, whereby D. bound himself to C. in the penal sum of 200*l.*, subject to the condition, that, if D. should pay to I., the defendant in the action, such costs as C., the plaintiff in the action, should in due course of law be liable to pay in case he should discontinue, becomes

nonsuit, or a verdict should pass against him, such costs to be first taxed, or in case of a judgment obtained by the defendant for his costs of defence; and also should permit C., during the pendency of the action, or of any liability to him arising therefrom, to retain and apply any of D.'s monies that might come into C.'s hands towards the discharge of any costs or liabilities which C. might be put to or incur by reason of his permitting the action to be carried on in his name, or from any injury to him thereby from the default or omission of D. to pay the same, the bond should be void, &c. C. was nonsuited in the action, and I. had judgment to recover his costs:—*Held*, that D.'s liability under the bond to pay such costs did not constitute a "debt" within the garnishee clauses of the Common Law Procedure Act, 1854, and could not be attached as such by the judgment creditor. *Johnson v. Diamond*, 73

2. The Westminster Improvement Commissioners, incorporated by Act of Parliament for the purpose of effecting certain improvements in Westminster, were empowered to borrow money on bond, and to advance money to builders for building purposes. By the condition of these bonds, all the bondholders were to be paid *pari passu*.

The commissioners advanced a certain sum to K., a builder. The plaintiff sued the commissioners on one of their bonds; and they suffered judgment by default:—*Held*, that the debt due from K. to the commissioners was not such a debt as could be attached under the 61st section of the Common Law Procedure Act, 1854; for the plaintiff could not enforce immediate payment of his judgment, and the effect of the garnishment would be to give

him a priority over the other bondholders. *Kennett v. The Westminster Improvement Commissioners*, 349

(5). *Equitable Defence.*

To an action for the non-performance of an alleged agreement to load a ship for a particular voyage with a guaranteed freight of not less than 5500*l.*, the Court refused to allow the defendant to plead, by way of equitable defence, that the real contract was, that the ship should earn freight at such a rate per ton, that, if filled, she would obtain 5500*l.*; and that, by mistake of the person who reduced the contract into writing in the Spanish language, which he imperfectly understood, it was described as an absolute guarantee that the ship should have a freight of 5500*l.*

Quære, whether the subject-matter of the proposed plea might be given in evidence under a denial of the contract. *Perez v. Oleaga*, 506

(6). *Equitable Relief.*

Where a plaintiff sues on a written contract, and the defendant pleads as a defence matter which he is in equity precluded from setting up by a term of the contract, not stated in the written instrument, a Court of law may, under the Common Law Procedure Act, 1854, give equitable relief without the instrument being first reformed.

To a declaration on a policy of assurance, the defendant pleaded that the policy was made upon the terms of a previous proposal, and upon the express condition, that, if any statement in the proposal was untrue, the policy should be void; and that a particular statement was untrue. Replication on equitable grounds: that, before the policy was made, the defendants issued a prospectus containing a statement, that all policies

effected by them should be indisputable, except in cases of fraud; and that the plaintiff effected the policy on the faith of such representation. Rejoinder: that the policy was made on the basis of the proposal; and that there was not, before or at the time of the making of the policy, any promise by the defendants that the policy should be indisputable except in cases of fraud, except that, before the proposal, the defendants issued the prospectus containing such statement:—*Held*, that the rejoinder was bad; and that the replication was, on equitable grounds, a good avoidance of the plea. *Wood v. Dwarries*, 493

(7). *Right of Landlord to appear and defend Ejectment.*

1. In an action of ejectment under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), a landlord, on complying with the requisites of the 172nd section, which enacts, that "any person not named in such writ shall, by leave of the Court or a Judge, be allowed to appear and defend, on filing an affidavit shewing that he is in possession of the land either by himself or by his tenant," is entitled, as a matter of right, to be let in to defend; and the Court or a Judge have no power, in the case of a landlord residing out of the jurisdiction, to impose upon him the condition of finding security for costs: per *Pollock*, C. B., *Platt*, B., and *Martin*, B. *Parke*, B., dubitante, being of opinion that the Court or a Judge have a discretion in the matter, where the landlord applies to defend as sole defendant and not as a defendant with the tenant in possession. *Buller v. Meredith*, 85

2. A person who has recovered judgment in ejectment upon a forfeiture of a lease, but has not actually obtained possession, is not by

statute 15 & 16 Vict. c. 76, s. 172, enabled to come in and defend an action of ejectment. *Thompson v. Tomkinson*, 442

(8). *Stay of Proceedings contrary to Injunction, Rule, or Order.*

O., the defendant's testator, instituted a suit in Chancery for the administration of the estate and effects of C., the plaintiff's testator. An order was made by the Court of Chancery, that the plaintiff be restrained by injunction from interfering with the estate or effects of C. The plaintiff brought an action against the defendant for an alleged infringement by O. of C.'s copyright in certain books:—*Held*, first, that the action was in disobedience of the order of the Court of Chancery, since the damages, when recovered, would be assets of C. in the plaintiff's hands: Secondly, that, under the 226th section of the Common Law Procedure Act, 1852, this Court had jurisdiction to stay proceedings in the action, although no writ of injunction had issued. *Cobbett v. Ludlam*, 446

(9). *Summing up Evidence.*

Under the 18th section of the 17 & 18 Vict. c. 125, the right of the party who begins, to sum up the evidence at the trial, is confined to the case where the Judge holds that there is evidence to go to the jury: per *Pollock*, C. B., *Parke*, B., and *Martin*, B.; dissentiente *Platt*, B. *Hodges v. Ancrum*, 214

COMPANIES CLAUSES CONSOLIDATION ACT, 1845, (8 & 9 Vict. c. 16).

Execution against Shareholder.

1. Under the 36th section of the Companies Clauses Consolidation Act, 1845, (8 & 9 Vict. c. 16), a party who has recovered judgment against a

company is not precluded from issuing execution against the shareholders who have not paid up the full amount of their shares, though lands of the company have been extended under an elegit, if the proceeds of the lands be insufficient to satisfy the debt.

If a sum certain has been actually received from the rents of the land extended under the elegit, the scire facias can only issue for the residue of the debt; but where no sum has been received, and the only means of satisfying the debt arises from the future rents, it is in the discretion of the Court whether they will permit the scire facias to issue. And where a judgment creditor for 300*l.* issued an elegit under which lands of the company were extended of the annual value of 10*s.* only, and the creditor did not take actual possession of the lands, it was *held* that he might issue a scire facias against the shareholders for the whole amount of his debt. *Addison v. Tate*, 250

2. The 36th section of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, which enables execution to issue against "*any of the shareholders*," if the execution against the property or effects of the company proves ineffectual, means shareholders at the time of the sheriff's return of nulla bona. *Nixon v. Green*, 550

COMPENSATION.

See LANDS CLAUSES CONSOLIDATION Act, 1854.

CONCURRENT WRIT OF SUMMONS.

See COMMON LAW PROCEDURE ACTS, (1).

CONTRACT.

See CARRIER, (4).

CORPORATION.

JOINT STOCK COMPANY, (3).

VENDOR AND VENDEE.

CORPORATION.

CONVEYANCE.

See STAMP, (3).

COPYHOLD.

The customary heir of a copyhold tenement cannot maintain trespass without entry; but after entry there is a relation back to the actual title as against a wrong-doer, and he may maintain an action for trespasses committed prior to his entry.

Semble, that the rule of law, that the title of an administrator has relation to the death of the intestate, so as to enable him to recover for injury to personal chattels prior to the grant of administration, applies also to leasehold property, but in that case he must first enter. *Barnett v. Earl of Guildford*, 19

CORPORATION.

See COUNTY COURT, (1).

JOINT STOCK COMPANY, (1).

Power to contract without Seal.

The plaintiffs, a company incorporated for the purposes of conveying mails, passengers, and cargo, between Great Britain and the Cape of Good Hope and Australia, and for that purpose to construct and maintain steam and other vessels, and to do all such other matters as might be incidental to such undertaking, contracted with the defendants, by parol, for the supply by the latter to the company of a quantity of ale. The ale was delivered and paid for by the plaintiffs, but turned out to be unfit for use:—*Held*, that the defendants were liable, although the contract was not under the seal of the company. *The Australian Royal Mail Steam Navigation Company v. Marzetti*, 228

COSTS.

See ATTORNEY'S BILL.
COUNTY COURT, (3).
DEBT.

PLEADING, (1).

SUMMARY PROCEDURE ON BILLS
OF EXCHANGE ACT.

(1). *Where new Trial is granted.*

Where a new trial is granted on the ground that the verdict was against evidence, the party who has succeeded on the second trial, but failed on the first, is not entitled to the costs of the trial without a special order of the Court. *Evans v. Robinson*, 40

(2). *Upon Discontinuance after Discharge of Jury.*

Where the jury, being unable to agree upon their verdict, are discharged by the Judge, and the plaintiff afterwards discontinues, the defendant is not entitled to the costs of the trial. *Wall v. The London and South Western Railway Company*, 696

(3). *Of the Day for not proceeding to Trial.*

A defendant is not entitled to the costs of the day for not proceeding to trial in pursuance of notice, where no one appeared on his behalf when the cause was called on. *Morgan v. Fernyhough*, 205

(4). *After Judgment of Court of Error on Special Case.*

A special case was stated under the 46th section of the Common Law Procedure Act, 1852, in which the question was, whether the plaintiff had a right to sell to the defendant certain tenant's fixtures and trade fixtures. The Court gave judgment for the plaintiff for the value of the trade fixtures, and for the defendant

as to the tenant's fixtures. The Master, on taxation, allowed the plaintiff the general costs of the cause, deducting therefrom the costs of the defendant in respect of that part on which he had succeeded. The defendant took proceedings in error, and the Court of error reversed the judgment for the defendant, and affirmed the judgment for the plaintiff, and increased it by the value of the tenant's fixtures, but made no mention of costs:—*Held*, that this Court had no power to direct the Master to review his taxation, by allowing the plaintiff his costs of the proceedings below, and disallowing those of the defendant; but that the costs must be taxed according to the judgment of the Court of error. *Elliott v. Bishop*, 321

(5). *Of Proceedings by Writ of Garnishment.*

The costs of proceedings by writ of garnishment under the 64th section of the Common Law Procedure Act, 1854, are in the discretion of the Court; but if liberty is given to issue the writ without any order as to costs, the successful party is entitled to them. *Johnson v. Diamond*, 431

(6). *Of Secondary Evidence.*

At the trial of an action on a bill of exchange, to which the defendant pleaded that he did not accept the bill, in order to let in secondary evidence of the contents of the bill, two clerks of the plaintiff's attorney were called, who deposed, that, after action brought, an envelope containing the bill had been laid by one of them on a desk in the office of the plaintiff's attorney, and that the other clerk had by mistake, not supposing that the envelope contained anything, thrown it into the fire, by which it was destroyed. The plaintiff ob-

tained a verdict. On the taxation of costs, the Master refused to allow the plaintiff, as against the defendant, the costs of these witnesses:—*Held*, per *Pollock*, C. B., and *Martin*, B., that the Master was right; *Alderson*, B., and *Platt*, B., contra. *Matthews v. Livesley*, 221

COUNTY COURT.

See *INSOLVENT DEBTOR*, (2).

LEGACY.

(1). *Corporation—Concurrent Jurisdiction.*

A corporation is liable to be sued in a county court.

A corporation "*dwells*," within the meaning of the 9 & 10 Vict. c. 95, s. 128, at the place where its business is carried on.

Therefore, where a joint stock company completely registered carried on its business within twenty miles of the place, and within the jurisdiction of the county court where the plaintiff resided, but several of the shareholders dwelt beyond that distance and out of such jurisdiction:—*Held*, that the superior Court had not concurrent jurisdiction with the county court.

Semle, that the 7 & 8 Vict. c. 110, s. 68, which enables the Court or a Judge to allow execution to issue against the shareholders of a joint-stock company, does not apply to a plaintiff in a county court.

Also, that where, in an action against a joint-stock company in a superior Court, not having concurrent jurisdiction with a county court, it appears, that, if the plaintiff had sued in the county court, he could not have obtained satisfaction from the property of the company, and that the shareholders reside out of the jurisdiction of the county court, that would afford sufficient ground

CUSTOM.

for giving the plaintiff costs under the 15 & 16 Vict. c. 54, s. 4. *Taylor v. The Crowland Gas and Coke Company*, 1

(2). *Prohibition.*

The writ of prohibition, to restrain a judge of a county court from further proceeding in a matter over which he has no jurisdiction, is a writ of right.

A party who objects that the county court has no jurisdiction to determine a point does not acquiesce in the jurisdiction of that court, or waive his right to a writ of prohibition, by obtaining from the judge the statement of a case for the opinion of a superior court. *Jackson v. Beaumont*, 300

(3). *Jurisdiction.*

The 3rd section of the 11 & 12 Vict. c. 123, which directs that the amount paid for carrying into force an order of two justices under that statute to abate a nuisance may be recovered from the owner of the premises where the nuisance existed, either in the county court or by proceeding before two justices, gives those tribunals exclusive jurisdiction. And therefore the county court has jurisdiction in such case, although title to the land comes in issue. *The Guardians of the Poor of the Hertford Union v. Kimpton*, 295

COVENANT.

See *DAMAGES*.

FIXTURES.

POWER.

WATERCOURSE.

CUSTOM.

See *CARRIER*, (4).

CHARTERPARTY, (1).

VENDOR AND VENDEE, (1).

CUSTOM OF LONDON.

The custom of London, which enabled the owner of an ancient house to erect a new house on the old foundations to any height, and so obstruct the access of light through his neighbour's ancient windows, is abrogated by the 3rd section of the Prescriptive Act, 2 & 3 Will. 4, c. 71. *Truscott v. The Master and Wardens of the Merchant Tailors Company*, 855

CUSTOMS ACT, (8 & 9 VICT. c. 87).

See INFORMATION.

DAMAGES.

See CARRIER, (2), (3), (4).

LANDLORD AND TENANT, (4).
PLEADING.

For Non-repair.

The plaintiff, being assignee of a lease which contained a covenant to repair, underlet the premises to the defendant, upon the terms, that he should "maintain them in as good a state as they would be when repaired by him." Shortly after the defendant took possession, the premises, which were old and dilapidated, were destroyed by fire. The jury found that the cost of rebuilding them would be 1635*l.*, but that they would be more valuable by 600*l.*:—*Held*, that the defendant was only bound to put the premises in the same state they would have been if he had repaired them before the fire, and consequently he was liable to pay as damages 1035*l.* only. *Yates v. Dunster*, 15

DEBT.

Order of Judicial Committee of Privy Council.

Debt will lie on a final order of

the Judicial Committee of the Privy Council for payment of costs, notwithstanding the order is made in a proceeding collateral to the original suit, and that suit is still undetermined. *Hutchinson v. Gillespie*, 798

DECLARATION OF WAR.

See ALIEN ENEMY.

DEMISE.

See LANDLORD AND TENANT.

DEVISE.

(1). *Fee by Implication.*

A testator bequeathed to his wife the rents and profits of certain dwelling houses, which were subject to a yearly chief rent, and after the death of his wife he bequeathed to his daughter the dwelling houses (without words of limitation), subject to the payment of the chief rent:—*Held*, that the charge was not on the person of the devisee but on the estate, and consequently it was not, by implication, enlarged into a fee. *Turnough v. Stock*, 37

(2). *Survivorship.*

A testator, by his will, made in 1812, after giving the whole of his property to his wife for life, devised as follows:—"Also I give to my grandson R. P. that house and garden now in the tenure of &c. Also, I give to my granddaughter A. P. this house which I now live in, with the garden &c. Also, I give to my granddaughters S. P. and J. P., a house at T. Also, I give to the said S. P. and J. P. a piece of arable land now in the tenure of &c. Also, I give to my grandson, R. P., 600*l.*

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5*l.* per cents. Also, I give to my granddaughter, A. P., 600*l.*, 5*l.* per cents. Also, I give to my two granddaughters, S. P. and J. P., 400*l.* each. *In case either of them die without issue, that portion to be divided amongst the survivors.*—*Held*, that A. P. took a greater estate than an estate for life in the property in question. *Bull v. Thomas*, 235

DISCOVERY.

See COMMON LAW PROCEDURE ACTS, (2).

DISTRESS.

See RAMSGATE HARBOUR ACT.

A declaration alleged that the plaintiff held certain premises as tenant thereof to the defendant, and that the defendant wrongfully distrained upon the said premises certain goods of the plaintiff, as a distress for alleged arrears of rent, to wit, the sum of 6*l.* 3*s.* by the defendant then pretended to be due and in arrear; and the defendant wrongfully remained in possession of the said goods under colour of the said distress until the plaintiff was compelled to pay, and did pay, to the defendant the pretended arrears of rent and costs of the distress, in order to regain possession of the goods: whereas, in truth, a small part only, to wit, 1*l.* 16*s.* 9*d.*, of the said pretended arrears was due:—*Held*, that the count disclosed no cause of action, for as the distress was lawful, the defendant was entitled to a tender of the amount really due, and upon his refusal to accept that sum, the plaintiff's course was to replevy the goods: *Crompton, J.*, dissentiente. *Glyn v. Thomas*, 870

EAST INDIA COMPANY.

See BOND, (1).

ESTOPPEL

EJECTMENT.

See COMMON LAW PROCEDURE ACTS, (7).

ELECTRIC TELEGRAPH COMPANY.

See POOR RATE.

EQUITABLE DEFENCE

See COMMON LAW PROCEDURE ACTS, (5).

EQUITABLE RELIEF.

See COMMON LAW PROCEDURE ACTS, (6).
RELEASE.

ERROR.

See AMENDMENT, (2).

ESTOPPEL.

See LANDLORD AND TENANT, (4).
LESSOR AND LESSEE.
POWER.

(1). *Replication of, to Plea of Liberum Tenementum.*

A replication by way of estoppel may be replied to a plea of liberum tenementum; and if the plaintiff does not avail himself of that liberty, but merely joins issue on the plea, the matter which might have been so replied is not conclusive evidence in his favour, but is merely evidence to go to the jury. *Lord Feversham v. Emerson*, 385

(2). *Verdict and Judgment in Indictment for obstructing Highway.*

A verdict of guilty, and judgment thereon in an indictment for obstructing a public highway cannot be pleaded as an estoppel in an action brought by the party convicted against a third person for using the way. *Petrie v. Nuttall*, 569

EVIDENCE.

See BILL OF EXCHANGE.

CHARTERPARTY, (1), (3).

COMMON LAW PROCEDURE ACTS, (9).

COSTS, (6).

ESTOPPEL, (1).

PAYMENT.

PLEADING, (1), (3).

SHIPOWNER.

Admissibility of Secondary Evidence.

It is the province of the Judge at Nisi Prius to decide all preliminary questions of fact upon which the admissibility of the evidence depends.

In an action of libel, the plaintiff, in order to prove the publication of the libel, tendered secondary evidence of the contents of a letter written by the defendant. On the part of the defendant, a document was produced as the original:—*Held*, that the Judge was at that stage of the cause bound to hear the evidence on both sides, and to decide whether the document offered was the original or not; and that, if it was, the secondary evidence was inadmissible. *Boyle v. Wiseman*, 360

EXCHANGE.

See GAME, (1).

EXECUTION.

See COMPANIES CLAUSES CONSOLIDATION ACT, 1845.

COUNTY COURT, (1).

JOINT STOCK COMPANY, (2).

SHERIFF.

(1). *Sale by Sheriff to Execution Creditor.*

Goods seized by a sheriff under a fi. fa. were valued and delivered to the execution creditor upon a bona fide purchase by him; but no bill of

sale was executed:—*Held*, that there was a valid sale of the goods. *Hernaman v. Bowker*, 760

(2). *Debt reduced below 20l. by Payment before Judgment.*

The defendant, being indebted to the plaintiff in a sum above 20l., before judgment, paid to the plaintiff a sum sufficient to reduce the debt below 20l. The plaintiff having signed judgment, and issued a ca. sa. for the whole amount:—*Held*, that the ca. sa. was not a nullity. *Blew v. Steinau*, 440

EXECUTOR.

See ADMINISTRATOR.

JUDGMENT.

SET-OFF.

FIERI FACIAS.

See EXECUTION, (1).

SHERIFF.

FIXTURES.

See COSTS, (4).

LANDLORD AND TENANT, (4).

By indenture, C. demised to E. an unfinished messuage for the term of ninety-seven years. The indenture contained a covenant by E. that, at the expiration of the term, he would deliver up the demised premises unto C., "together with all locks, keys, bars, bolts, marble and other chimney-pieces, footpaces, alabs, and other fixtures and articles in the nature of fixtures, which shall, at any time during the said term, be fixed or fastened to the said demised premises, or be thereto belonging." E. took possession of and completed the messuage, and fitted it up with things necessary for carrying on the business of a tavern-keeper and licensed victualler; and for that purpose put in the premises certain fix-

tures of the description called and known as trade and tenant's fixtures. B. afterwards contracted with E. to purchase from him an underlease of the premises and the goodwill, and also the furniture, fixtures, stock in trade, &c., at a valuation. In pursuance of this contract, E. executed to B. an underlease, which contained a covenant on the part of the defendant in the same words as the above covenant by E. in his lease:—*Held*, on error, that the covenant above set forth did not restrain B. the lessee from disposing either of the tenant's or of the trade fixtures. *Bishop v. Elliott*, 113

FRAUDULENT PREFERENCE

See BANKRUPT, (3).

FRAUDULENT REPRESENTATION.

See VENDOR AND VENDEE, (2).

FRAUDULENT TRANSFER.

See BANKRUPT, (4).

FREIGHT.

See COMMON LAW PROCEDURE ACTS, (5).
INSURANCE.

FRIENDLY SOCIETY.

A claim by an administrator on a policy of life assurance, granted to the intestate by a society enrolled under the Friendly Societies Acts, 10 Geo. 4, c. 56, and 4 & 5 Will. 4, c. 40, is not "a dispute between the society and a member, or a person claiming on account of a member," within the meaning of the 27th section of the 10 Geo. 4, c. 56, which requires such disputes to be determined by arbitration.

A society enrolled under the 10

Geo. 4, c. 56, and 4 & 5 Will. 4, c. 40, cannot legally grant assurances on lives, notwithstanding rules authorising them to do so have been certified and allowed. *Kelsall v. Tyler*, 513

GAME.

Right of Lord of Manor.

1. The plaintiff's father was lord of a manor, within which was a stinted pasture, and as such lord was owner of the soil and entitled to all mines and minerals and to other rights, royalties, liberties, and privileges upon and over it, and to the exclusive right of hunting, shooting, fishing, and fowling; but there was no right of free warren. The plaintiff's father and other persons were owners of tenements within the manor, and of shield rooms upon the pasture, in respect whereof they were entitled to cattlegates and to rights of common of turbary. In 1811 an Act of Parliament was passed for inclosing the pasture. This Act recited that the plaintiff's father was lord of the manor; that there was within the manor the said stinted pasture; that he as lord was owner of the soil and entitled to all mines and minerals and to other rights, royalties, liberties, and other privileges in and over it; and that he and other persons were owners of tenements within the manor and of shield rooms upon the pasture, in respect whereof they were entitled to cattlegates on it and to rights of common of turbary and other rights therein. The Act then recited that it would be of benefit to the persons interested if the pasture was divided and allotted severally amongst the persons entitled to cattlegates thereon, and proceeded to appoint commissioners for that purpose. The Act directed the commissioners to allot to the plaintiff's father, as lord

of the manor, his heirs and assigns, one twelfth part of the pasture "*in lieu of and in full recompense and satisfaction for all his right and interest, as lord of the said manor, of, in, and to the soil of the residue of the said stinted pasture.*" The Act then directed that the residue of the pasture should be allotted to the plaintiff's father and other persons entitled to cattlegates, rights of common, and other rights upon it, and the allotments were declared to be freehold. The Act reserved to the plaintiff's father, and the lords of the manor for the time being, all mines under the pasture, and full powers were conferred on them for working the mines. The Act also provided that nothing therein contained should prejudice, lessen, or affect the right, title, or interest of the plaintiff's father, his heirs, &c., lords of the manor for the time being, in or to any seignories, royalties, rights, or services incident or belonging to such manor; but they should and might at all times thereafter hold and enjoy the same respectively, and all rents, services, fines, courts, &c., "*and also right of hunting, shooting, fishing, and fowling in, through, and over the said stinted pasture and every part and allotment thereof*; and all other seignories, royalties, and privileges to the lords of the said manor for the time being incident and belonging (other than and except those which were expressly declared to be barred, destroyed, and extinguished by that Act), *in as full, ample, and beneficial a manner as they respectively could or might have held and enjoyed the same in case this Act had not been passed.*" In 1814 an allotment in the pasture was made to the plaintiff's father in respect of an estate called Woodside, and an allotment called the Clint allotment was made

to J. E. in respect of a customary tenement. In 1823, the plaintiff's father agreed with the defendant's grandfather to exchange the Woodside allotment for an allotment belonging to the latter. This exchange was effected by two deeds, dated the 1st of February, 1823. One of these deeds was made between the plaintiff's father and the plaintiff of the one part, and J. E. of the other part; and by it the former conveyed to the latter the Woodside allotment, with a reservation to them and the lords of the manor of the mines and minerals, and also the liberty and privilege of hunting, hawking, coursing, shooting, fishing, and fowling over the said tenement, &c. By the other deed, which was between the same parties, J. E. conveyed to the plaintiff's father the land by him agreed to be given in exchange for the Woodside allotment, and he granted to the plaintiff's father and the lords of the manor the same right of sporting, and he covenanted to allow them to proceed against trespassers in his name. In 1829 the Woodside allotment came by descent to the defendant's father, and in 1846 he purchased the Clint allotment. Since 1831 the owner of these allotments sported over them, claiming to do so as of right, and the plaintiff during the same time exercised the right of shooting concurrently. In 1862 the defendant's father claimed the exclusive rights of sporting over the Woodside and Clint allotments, and the defendant did so with his authority:—*Held*, first, that the plaintiff had the exclusive right of hunting, shooting, fishing, and fowling over the Woodside allotment. Secondly, that he had no right of sporting over the Clint allotment, either exclusive of or concurrent with the owner of it. Thirdly, that the concurrent enjoy-

ment of the right, for more than twenty years, by the owners of the allotments, claiming to do so as of right, did not deprive the plaintiff of his exclusive right. *Sir J. Graham v. Ewart*, 326

2. Bretherdale Bank is a tract of inclosed pasture land within the manor of Bretherdale, in the county of Westmoreland. Bretherdale Bank had been from time immemorial subject to eighty customary rights called cattlegates. The plaintiff was lord of the manor of Bretherdale. The defendant was seized of certain cattlegates as a customary estate of inheritance. The plaintiff was also the owner of a cattlegate, which came to his predecessor as lord of the manor by seizure quousque for non-payment of a fine. Bretherdale Bank is separated from Bretherdale Waste by a fence which the cattlegate owners kept in repair with stones got from Bretherdale Bank and from the adjoining waste. Each cattlegate gave the owner thereof a right of depasturing on Bretherdale Bank a certain number of cattle and sheep from the 26th of May to the 24th of April, but neither cattle nor sheep were allowed to pasture there between the 24th of April and the 26th of May. An alteration had been made in the time of stinting by substituting the 26th of May for the 1st of June; but it did not appear that the lord of the manor had any notice of the alteration, and the court rolls did not contain any mention of stinting. The whole of the cattle and sheep depastured Bretherdale Bank in common. A frithman was appointed by the cattlegate owners, whose duty it was to take care that Bretherdale Bank was properly stinted, and he was remunerated for his trouble by the cattlegate owners. A cattlegate owner having a house within the

manor had also a right to cut peat for consumption in his house. By 46 Geo. 3, c. lxiv., authority was given to the lord of the manor to enfranchise any copyhold or customary messuages, cottages, lands, tenements, or hereditaments, parcel of the manor; and several cattlegates were enfranchised under this Act: but there was no distinction in point of enjoyment between the enfranchised and the customary cattlegates. From time immemorial the cattlegates had been held of the lord of the manor as customary estates of inheritance by payment of fine certain, rents of small amount being payable annually for each cattlegate, and under dues, duties, suits, and services of right accustomed. On the death of a cattlegate owner, the cattlegate descended by custom to the heir at law, who was admitted at the lord's court, when he paid a fine. The cattlegates also passed by customary deed, followed by admittance at the next lord's court, or out of court by the steward of the manor. The deed was brought into court by the alienee, and was presented by the jury or homage. A fine was payable on the admittance, but there was no heriot due on the death of the lord of the manor; the owners of cattlegates might by the custom enforce their admittance by the new lord, on payment of a fine. The lord was entitled to seize quousque for nonpayment of fines. On alienation by a feme covert, the woman was examined apart from her husband. The lords of the manor had always searched for, pursued, and killed grouse and other game on Bretherdale Bank, no other person having claimed to do so, or ever having done so except by their license. Since 1819, the lords of the manor had preserved the game.

In an action of trespass and trover

for shooting grouse on Bretherdale Bank without the plaintiff's permission—*Held*, per *Platt*, B., and *Martin*, B., that, under the preceding facts, the action was maintainable; per *Pollock*, C. B., and *Alderson*, B., that it was not. *The Earl of Lonsdale v. Rigg*, 654

GARNISHMENT.

See COMMON LAW PROCEDURE ACTS,
(4).
Costs (5).

GRAND JUNCTION CANAL COMPANY.

Exemption from Toll.

By stat. 33 Geo. 3, c. lxxx. the Grand Junction Canal Company were empowered to take tolls for the passage of manure between Braunston and Brentford. By s. 97, persons occupying lands through which the canal passed might carry manure without payment. By stat. 34 Geo. 3, c. xxiv., for making a cut to Buckingham, the powers and authorities mentioned in the former Act were to be exercised by the company and by the owners of lands on the new cut, as if re-enacted, and the like exemptions were to be allowed. By 35 Geo. 3, c. xliii., reciting the first-mentioned Act, the company were empowered to make a cut to Paddington; and the several powers, authorities, matters, and things in the recited Act contained, except the rates, were to be used and exercised *by the company*, and applied for making the cut and for ascertaining tolls, and in all respects as if re-enacted, and as if the cut had been part of the works authorised to be made by the first Act.

By stat. 35 Geo. 3, c. lxxxv., for making a cut from Watford to St. Alban's, reciting the before-mention-

ed Acts, the powers granted thereby were to be exercised by the company and by the owners of lands as if re-enacted, and the like exemptions were allowed: *Held*, first, that, on the construction of the 35 Geo. 3, c. xliii., persons occupying lands on the Paddington cut could not carry manure on the canal free from toll: Secondly, that the provisions of the several public local Acts with respect to the tolls on different cuts, parts of the same canal, might be compared in order to ascertain the meaning of a clause in the Paddington Act, alleged to create exemptions from toll upon the Paddington cut. *Tame v. The Company of Proprietors of the Grand Junction Canal*, 786

GUARDIANS OF POOR.

See BOND, (2).
POOR.

HARBOUR.

See MARYPORT HARBOUR ACT.

HEIR.

See COPYHOLD.

HIGHWAY.

See ESTOPPEL, (2).

INDORSEMENT.

See SUMMARY PROCEDURE ON BILLS OF EXCHANGE ACT.

INFANT.

See LEGACY.

INFORMATION.

An information under the Customs Act (8 & 9 Vict. c. 87), charged, in the three first counts, five defendants with several offences on different

days; and, in the four following counts, it charged four of those defendants, together with four others, with similar offences on other days. A verdict having been found for the Crown,—*Held*, no ground for arresting the judgment, for the defect (if any) might be cured by the mode in which the judgment was entered up. *The Attorney-General v. Ruck*,

763

INSOLVENT DEBTOR.

See SHERIFF.

(1). *Description of Debt in Schedule.*

W. drew, and the defendant accepted, a bill of exchange for 26*l.* 7*s.* 6*d.*, as a renewal of a bill accepted by the defendant's partner. The defendant afterwards petitioned the Insolvent Court under the 7 & 8 Vict. c. 96, and named in his schedule, as creditors, the representatives of W., who was dead, with this description:—"Amount of debt 30*l.*—These creditors hold a bill of exchange, drawn by self and partner, and afterwards renewed by self." The defendant obtained a final order for protection, and the indorsees of the bill afterwards sued him for the amount:—*Held*, that the bill was not set forth in the schedule, as required by the 22nd section of that statute, and therefore the defendant was not discharged from the debt. *Kemp v. Hurry*,

47

(2). *Liability to Imprisonment by Order of County Court.*

A debtor, who has obtained his discharge under the Insolvent Debtors Act, 1 & 2 Vict. c. 110, s. 75, is still liable, at the discretion of the judge of a county court, to be committed to prison, under the 99th section of the 9 & 10 Vict. c. 95, for disobedience of an order made upon

a judgment summons under the 98th section obtained after such discharge. *George v. Somers*,

202

INSPECTION OF DOCUMENTS.

The Court refused to grant an order for the inspection of a document upon an affidavit made by the defendant, which stated that the plaintiff's claim was for money lent to the defendant's wife, and that the first intimation which the defendant received of such claim was after the death of his wife, but on the day of her death, when the plaintiff shewed the defendant an account book, which the plaintiff stated contained accounts between himself and the defendant, and in which the defendant believed the sum claimed was charged against him, and that he was desirous of knowing whether the money was advanced before or after his marriage with his deceased wife. *Wright v. Morrey*,

202

INSURANCE.

Insurable Interest.

C. & Co., the owners of a brig, wrote to the plaintiffs, merchants at New Orleans, to procure a freight for the vessel, stating that if the plaintiffs accepted a charter for Great Britain, they preferred the captain drawing against freight. In this letter was inclosed a letter from C. & Co. to the captain, in which they referred him to the plaintiffs to procure a charter for the vessel. The captain shewed his letter to the plaintiffs, and asked them if they would draw on account of freight; and they said they would. The vessel was loaded as a general ship for Liverpool, and was intended to be consigned to M. & Co.; the plaintiffs wrote to C. & Co., informing

them that the vessel was being loaded as a general ship, and stating that they would draw upon the freight for the amount of disbursements. The captain accordingly drew on M. & Co., requesting them to charge the same to account of freight. M. & Co. refused to accept the draft, and it was indorsed to G. & Co., the plaintiffs' agents, who effected an insurance on the freight. The vessel was lost by perils of the seas on her voyage from New Orleans to Liverpool. In an action by the plaintiffs on the policy:—*Held*, that the plaintiffs had an insurable interest, and that it was correctly described as "advance on account of freight." *Wilson v. Martin*, 684

INTERPLEADER ACT.

1 & 2 WILL. 4, c. 58, s. 6.

(1). *Power to relieve Sheriff before actual Seizure.*

The Court or Judge has jurisdiction to make an interpleader order, on the application of a sheriff *intending* to seize goods, though before actual seizure; but such jurisdiction will be rarely exercised. *Lea v. Rossi*, 13

(2). *Power to stay Proceedings in Action against Sheriff.*

A sheriff entered the house of A. and seized therein his goods, and also goods belonging to the execution debtor. A. brought an action of trespass against the sheriff, who thereupon obtained an interpleader summons, and the Judge ordered that the execution creditor be barred as to the goods of A., and that all further proceedings in the action be stayed:—*Held*, that the Judge had power under the Interpleader Act, 1 & 2 Will. 4, c. 58, s. 6, to stay the proceedings, and that the power was properly exercised, it not appearing

that the sheriff had committed any excess. *Winter v. Bartholomew*, 704

INTERROGATORIES.

See COMMON LAW PROCEDURE ACTS, (2), (3).

INJUNCTION.

See COMMON LAW PROCEDURE ACTS, (8).

JOINT STOCK BANK.

See BANKING COPARTNERSHIP.

JOINT STOCK COMPANY.

See CORPORATION.

COUNTY COURT, (1).

WINDING-UP ACT.

(1). *Acceptance by Assignees of Shares of Bankrupt.*

In November, 1847, R., being owner of 157 shares of 100*l.* each, in an incorporated company, became bankrupt. Only 25*l.* per share had been paid. At the time of the bankruptcy, the bankrupt delivered the certificates of the shares to the official assignee. At that time the shares were of no value. In June, 1849, notice was given to the official assignee of a call of 1*l.* per share, which he was requested to pay. Nothing further was done by the company or the assignees until February, 1853, when, the shares having become valuable, the assignees claimed to be registered in the company's books as the owners of them, and offered to pay whatever was due for calls. In answer to their application, they received a letter from the secretary of the company, stating that there were no shares standing in the registry book in the name of the bankrupt:—*Held*, that, assuming it was necessary that the assignees should, within a reasonable time, do

some act to signify their acceptance of the shares, the question of reasonable time was one for the jury; but that a reasonable time would not begin to run until some one interested in the matter took some step in respect of it. *Graham v. The Van Diemen's Land Company*, 101

(2). *Execution against Shareholder.*

An application, under the 7 & 8 Vict. c. 110, by a judgment creditor of a joint stock company, for leave to issue execution against a shareholder, was founded on affidavits, which stated that a writ of *fi. fa.* was issued by the plaintiff against the goods of the company, and placed in the hands of the sheriff, to be executed; that the sheriff returned *nulla bona*; that the chief office of the company was closed, and that no business, to the best of the deponent's belief, was carried on there; and that he believed that any execution against the property and effects of the company would be wholly unavailing:—*Held*, that the facts disclosed did not shew that the plaintiff had used due diligence to obtain satisfaction of his judgment by execution against the company, since there was no affidavit of the sheriff's officer shewing what he had done under the writ. *King v. The Parental Endowment Assurance Company*, 443

(3). *Contract by Director.*

The 7 & 8 Vict. c. 110, s. 23, which prohibits the promoters of a joint-stock company provisionally registered from (*inter alia*) contracting for or holding land, &c., except the contract be made conditional on the completion of the company, and to take effect after the certificate of complete registration, only applies to contracts made by the directors *as such* on behalf of the company; and, therefore, where the plaintiff agreed

to let to the defendant, and the defendant agreed to take certain premises at a yearly rent:—*Held*, that the contract was valid, notwithstanding the defendant was a director of a joint stock company provisionally registered, and the premises were taken by him for the use of, and were occupied by, the company. *Job v. Lamb*, 539

JUDGMENT.

Nunc pro tunc.

In March, 1854, at the Spring Assizes, a verdict was entered for the plaintiff, subject to a reference. In April following the plaintiff died. On the last day of Michaelmas Term, the arbitrator made his award, directing that the verdict for the plaintiff should stand:—*Held*, that, as by the 17 Car. 2, c. 8, an executor is entitled to two terms from the verdict to enter up judgment; and as the verdict was inchoate only till the award was made, and the executrix could not have entered up judgment in Michaelmas Term, an application in the following Easter Term to enter up judgment as of Easter Term, 1854, *nunc pro tunc*, was in time. *Heathcote v. Wing*, 355

JUSTICES (ORDER OF).

See COUNTY COURT, (3).

LANDLORD AND TENANT.

See COMMON LAW PROCEDURE ACTS, (7).

DAMAGES.

DISTRESS.

FIXTURES.

(1). *Inclosure of Waste by Tenant.*

Where a tenant incloses land, whether adjacent to or distant from the demised premises, and whether the land be part of a waste, or belong to the landlord or a third per-

son, it is a presumption of fact, that the inclosure is part of the holding, unless the tenant, during the term, does some act disclaiming his landlord's title.

Certain premises were demised by the description of "all that cottage or tenement, with the garden thereto adjoining and belonging, situate &c.; and also a piece or parcel of land lying near to the said cottage or tenement, containing by estimation three quarters of an acre (more or less), lately used as garden ground:"—*Held*, that, under such description, an adjoining piece of waste land would not pass, unless it had been theretofore used as an outlet of the garden. *Kingsmill v. Mil-lard*, 313

(2). *Construction of Agreement not to sell Hay or straw off demised Land.*

A farming agreement contained the following clause:—"No hay or straw to be sold off the said land without consent of the landlord or his agent, except the value of the straw so sold off be returned in manure on the said land:"—*Held*, per *Pollock*, C. B., and *Parke*, B., that, if the tenant sold the hay or straw, he was only bound to spend upon the land as much manure as the straw would have produced; Per *Alderson*, B., and *Platt*, B., that the tenant was bound to return in manure the price or market value of the straw. *Lowndes v. Fountain*, 487

(3). *Implied Contract to give Possession.*

By agreement in writing, the defendants agreed to let to the plaintiff certain premises, for the term of one year from the 29th of September, 1854, and so on from year to year as long as the parties thereto should agree:—*Held*, that there was

an implied contract on the part of the defendants to give the plaintiff possession of the premises. *Jinks v. Edwards*, 775

(4). *Measure of Damage for not delivering up Fixtures.*

The defendant was tenant to the plaintiff, who was owner of the equity of redemption, under a lease whereby the defendant covenanted to deliver up to the plaintiff, at the expiration of the term, the premises and all fixtures therein. The term expired on the 1st of April, 1855; and, on the 10th, the plaintiff demanded possession, which was not given. On the 13th, the mortgagee gave notice to the defendant to pay the rent and deliver up the premises to him. The plaintiff having sued the defendant for a breach of his covenant in not delivering up the fixtures:—*Held*, that the defendant was not estopped from setting up the title of the mortgagee, and that the plaintiff could not recover the value of the fixtures, but only the actual damage sustained by him in consequence of their detention from the 10th to the 13th of April. *Watson v. Lane*, 769

LANDS CLAUSES CONSOLIDATION ACT, 1854.

(8 & 9 VICT. c. 18.)

An arbitrator appointed under the 68th section of the Lands Clauses Consolidation Act, 1854, has no jurisdiction to adjudicate upon any collateral matter affecting the claim to compensation, but only to determine the amount of damage. *In re Byles and The Ipswich Dock Commissioners*, 464

LEASE

See LANDLORD AND TENANT, (1), (3). POWER.

LEGACY.

A bequest of money in trust to invest the same during the minority of an infant, and pay it to him when of age, with power to apply it towards his education or advancement, is not a "legacy" within the County Courts Act, 9 & 10 Vict. c. 95, s. 65. *Hewston v. Phillips*, 699

LEGACY DUTY.

See SUCCESSION DUTY ACT, 1853.

LESSOR AND LESSEE.

See FIXTURES.

Denial of Title of Lessor.

A declaration in covenant by devisee of the reversion against lessee, alleged that the reversion of and in the demised premises belonged to the lessor and his heirs. Plea, that the reversion of and in the demised premises did not belong to the lessor and his heirs. Replication by way of estoppel, that the lease was an indenture executed by the defendant, and that he entered and enjoyed the demised premises by virtue of the indenture; that it did not appear by the indenture that the lessor was not seised in fee, or that he had any estate or interest other than a fee simple; nor did the indenture contain anything to shew that the reversion did not belong to the lessor and his heirs. On demurrer to the replication:—*Held*, that the plea was good, under the Common Law Procedure Act, 1852, as traversing a material allegation in the declaration; also that the replication was bad, since the lessor might have had a term of years, or an estate for life, or *pur autre vie*. *Weld v. Baxter*,

816

LIBEL.

See EVIDENCE.

LIBERUM TENEMENTUM.

See ESTOPPEL, (1).

LIFE ASSURANCE.

See COMMON LAW PROCEDURE ACT, (6).

FRIENDLY SOCIETY.

LIGHT.

See CUSTOM OF LONDON.

LIMITATIONS (STATUTE OF).

See RAMSGATE HARBOUR ACT.

LONG WEIGHT.

See WEIGHTS AND MEASURES.

LORD OF MANOR.

See GAME.

MANOR.

See GAME.

MARYPORT HARBOUR ACT,
(3 & 4 WILL. 4, c. cxiii.)*Liability of Trustees.*

By the 3 & 4 Will. 4, c. cxiii. "An Act for the better preserving the Harbour of Maryport," &c., certain trustees were appointed for carrying out the Act. The trustees acted gratuitously; the property in the harbour was vested in them, and they were empowered to elect a harbour-master, and other officers and servants connected with the harbour, with power also to discharge them. The harbour-master was empowered to direct the situation in which a vessel entering the harbour was to be moored. The trustees were also empowered to make bye-laws as to the management of the harbour, and to impose tonnage

rates upon vessels using it, and to borrow money on such rates, and to apply the proceeds in payment of the interest of the money borrowed, and of the costs and expenses attending the carrying into execution the purposes of the Act connected with the harbour, and also in the reduction of the capital borrowed:—*Held*, that the trustees were not liable, either, first, for the acts of the harbour-master in directing a vessel to be moored in an improper place, whereby it received damage; or, secondly, for an injury occasioned to a vessel by an accumulation of rubbish in the harbour.

Held, also, that although the trustees had almost an absolute discretion (with certain exceptions) in the appropriation of the fund for the management of the harbour, they would not have been liable for the accident arising from the accumulation of rubbish in the harbour, if they had been in possession of funds.

A declaration which charges a breach of duty, must contain an allegation from which the duty can be inferred, otherwise the declaration is bad. *Metcalf v. Hetherington*, 257

MASTER AND SERVANT.

See SUB-CONTRACT.

MORTGAGE.

See LANDLORD AND TENANT, (4).
STAMP, (2).

Account in Equity.

Declaration on a covenant in a mortgage deed by S. A. (the defendant's testatrix) and H. A. for payment of 2800*l.* and interest. Plea on equitable grounds, setting out the deed, which recited the will of G. A., whereby he bequeathed (inter alia) his furniture, plate, books, pictures,

&c. subject to the payment of his debts, to S. A. for life, and after her decease to H. A. The deed also recited a decree of the Court of Chancery, by which it was ordered that the furniture and other articles aforesaid should be sold, and the proceeds paid into Court; that the books and pictures had been valued at 2050*l.*, at which sum H. A. had agreed to purchase them; and that, to enable him to do so, the plaintiffs had agreed to lend him 2050*l.*, and a further sum of 749*l.* 5*s.* upon the security of the joint and several covenants of S. A. and H. A., and an assignment (inter alia) of the furniture, &c. The deed then witnessed that S. A. and H. A. assigned (inter alia) the furniture, plate, pictures, and books to the plaintiffs as a security for 2800*l.* with a power of sale in default of payment, the plaintiffs to hold the proceeds of the sale in trust to pay the expenses, and then to apply the monies in satisfaction of the principal and interest due. The plea then averred, that the plaintiffs sold the furniture &c., and received sufficient to satisfy the principal and interest, which they ought to have applied accordingly.—Replication on equitable grounds, except as to 2085*l.* 18*s.* 4*d.*, parcel of the plaintiff's claim: that the valuation of the plate and furniture was not complete at the time of the execution of the deed, and that they were afterwards valued at 706*l.* 8*s.*, at which sum H. A. agreed to purchase them; that, by an indenture between H. A. and the plaintiffs, after reciting (inter alia) that 2800*l.* and interest was due to the plaintiffs, that S. A. had died, and that, in order to enable H. A. to purchase the plate and furniture, the plaintiffs had agreed to lend him 600*l.*, H. A. assigned to the plaintiffs all the property mentioned in the deed to secure the 2800*l.* and

interest, and 600*l.* and interest, together with a power of sale. The replication then stated that the plaintiffs sold the plate and furniture, and, after expenses, realised 1127*l.* 15*s.*, and that there was due under the indenture in respect of the 600*l.* and interest 638*l.* 5*s.* 6*d.*; that H. A. not having paid into the Court of Chancery the 706*l.* 8*s.* for the purchase of the plate and furniture, the plaintiffs, in order to pay the same, retained out of the money realised by the sale 706*l.* 8*s.*; and that the sums of 638*l.* 5*s.* 6*d.* and 706*l.* 8*s.* being deducted from the proceeds of the sale, the plaintiffs never realised more than 2085*l.* 18*s.* 4*d.*, which was only sufficient to pay a part of the plaintiffs' claim in the declaration:—*Held*, that, in taking the account in equity, the plaintiffs were not entitled to deduct from the amount for which the property sold the 600*l.* and interest, for that would in effect be to tack the mortgage of 2800*l.* to the mortgage of 600*l.*, which could not be done, since the equity of redemption was in different persons; but that the plaintiffs were entitled to deduct the 706*l.* 8*s.*, since the whole property was not in their possession, and they had no right to sell it until the 706*l.* 8*s.* was paid into Court. *Marcon v. Blossam*, 586

NEGLIGENCE.

See CARRIER, (4).

SUB-CONTRACT.

WATER COMPANY.

NOTARIAL CERTIFICATE.

See COMMON LAW PROCEDURE ACTS, (1).

NUISANCES REMOVAL AND DISEASES PREVENTION ACT, 1848. (11 & 12 VICT. c. 123.)

See COUNTY COURT, (3).

PATENT.

ORDER IN COUNCIL.

See ALIEN ENEMY.

OVERSEER.

See BOND, (2).

PACKED PARCELS.

See CARRIER, (1).

PARTICULARS OF DEMAND.

See AMENDMENT, (1).

PARTIES TO ACTION.

See POWER.

PATENT.

New Method of accomplishing a well-known Object.

In 1844, G. obtained a patent for "Improvements in grinding wheat and other grain." He described as his invention "the forcing and distributing of atmospheric air from the eye or centre of mill-stones, for the purpose of cooling the grain during the process of grinding;" this was effected by an air-box placed below the mill-stones, into which air was forced by the rapid rotation of a fan or blower, which caused a current of air perpendicular to the axis of the fan; and the air was conducted by a pipe through the eye of the lower stone to the centre of the two stones, and there distributed between them by an apparatus provided with fans or arms. In 1846, the plaintiff obtained a patent for "Improvements in manufacturing wheat and other grain into meal and flour." His invention consisted of the application of ventilating vanes or screws at the centre of the stones for supplying the air between the grinding surfaces; a portable ventilating machine, blowing by a screw

vane, which caused a current of air parallel to the axis of the vane, was attached externally to the eye of the upper mill-stone; the screw vane being set in rapid motion, the air was compelled to pass through the eye into the centre of the two stones, and so find its way out between them. In 1851, the defendant obtained a patent for "Improvements in grinding wheat," and his plan was to remove from the centre of both stones a large circular portion of each, and in this space, opposite to the separation of the two stones, to place a fan or blower, by the rapid rotation of which a centrifugal motion was given to the air, and it was driven between the stones:—*Held*, first, that the defendant's invention was no infringement of the plaintiff's, but that each was a new method of accomplishing a well-known object, viz. the cooling grinding substances by the common principle of obtaining a current of air by a rotating vane. Secondly, that the construction of the specification was a question of law for the Court, and not for the jury. *Bovill v. Pimm*,

718

PAYMENT.

See **BANKRUPT**, (3).

T. kept an account at a bank, who discounted for him a bill for 365*l.*, drawn by him upon, and accepted by, the defendant. The day before the bill became due T. went to the bank, who held another bill of his for 370*l.*, due that day, and requested the manager to "retire" the two bills by discounting two others of similar amounts. The manager consented, and T. gave him a bill for 365*l.*, purporting to be accepted by the defendant, to "retire" the bill of that amount. The bank discounted the second bill for 365*l.*, and placed the proceeds to the cre-

dit of T., minus the discount, and they got back from their London agent the first bill for 365*l.*, with the acceptance cancelled. Several thousand pounds had been subsequently paid by T. into the bank. It afterwards turned out that the acceptance of the second bill for 365*l.* was forged by T. In an action by the bank against the defendant, as acceptor of the first bill:—*Held*, that the facts did not support a plea of payment of the bill by T. *Bell v. Buckley*, 631

PLEADING.

See **AGREEMENT**.

ALIEN ENEMY.

CHARTERPARTY, (2).

COMMON LAW PROCEDURE ACTS,

(5), (6).

DISTRESS.

ESTOPPEL, (1), (2).

INFORMATION.

LESSOR AND LESSEE.

MARYPORT HARBOUR ACT.

PAYMENT.

POWER.

RELEASE.

SET-OFF.

(1). *Payment in Satisfaction of Debt and Damages.*

Action for goods sold and delivered.—Plea, except as to 22*l.* 8*s.* 3*d.*, parcel &c., never indebted, and as to 22*l.* 8*s.* 3*d.* payment after action brought of 22*l.* 8*s.* 3*d.* "in satisfaction of the said claim of 22*l.* 8*s.* 3*d.*, and all damages accrued in respect thereof." At the trial, the plaintiff offered no evidence on the first issue, and the defendant proved that he paid 22*l.* 8*s.* 3*d.* to the plaintiff, who accepted it, no mention being made of costs:—*Held*, first, that the plea was not proved, since the costs, which were part of the damages, were not paid; and therefore the plaintiff was entitled to a verdict,

with nominal damages. Secondly, that the Reg. Gen., H. T., 1853, r. 22, did not affect the plaintiff's right to maintain the action in respect of the costs. *Cook v. Hopewell*, 555

(2). *Replication to Plea of Statute of Limitations.*

A replication, under the 4 Ann. c. 16, s. 19, to a plea of the Statute of Limitations, need not allege that the defendant has returned to this country, or that the action was commenced within six years after his return. *Forbes v. Smith*, 161

(3). *Replication to Plea of Son Assault Demeasa.*

In an action of assault and battery, to which the defendant pleads the plea given by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76, Sched. B.), that "the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defence," the plaintiff may, under the general form of replication joining issue on the plea, and without replying excess, shew that, although he struck the first blow, the defendant was guilty of excess. *Dean v. Taylor*, 68

POLICY OF ASSURANCE.

See COMMON LAW PROCEDURE ACTS, (6).

FRIENDLY SOCIETY.

POOR.

See BOND, (2).

Liability of Guardians for Salary of Collector of Poor Rate.

Held, in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that guardians of the poor are not liable to pay the salary

of a collector of poor rate appointed by them in pursuance of an order of the Poor Law Commissioners. *Smart v. The Guardians of the Poor of the West Ham Union*, 867

POOR RATE.

Electric Telegraph Company.

The Electric Telegraph Company are liable to be rated for the relief of the poor in respect of their wires and posts placed along the line of a railway company, notwithstanding the latter may require their removal to a more convenient place. *The Electric Telegraph Co., App.; Overseers of the Poor of Salford, Resp.* 181

POWER.

To lease.

By a settlement made in 1840, S., in contemplation of his marriage, conveyed certain real estates to trustees to his own use until the marriage, and after the marriage to the trustees, their executors, administrators, and assigns, for the term of 500 years, without impeachment of waste, upon certain trusts, and immediately after the expiration or sooner determination thereof, and in the meantime subject thereto, to the use of S. for life, without impeachment of waste, with remainder to certain other uses. It was also provided by the deed, that it should be lawful for S., during his life, from time to time, by deed either referring to or not referring to the power, to demise the said real estate for any term not exceeding twenty-one years, so that there should be reserved the best or most improved yearly rent, to be incident to the immediate reversion of the hereditaments so demised, that could be obtained for the same, and so that the lessee was not by

any clause or words therein to be contained made punishable: for waste, or exempted from punishment for committing waste. The marriage took place, and S. afterwards, by deed, leased the premises to the defendant for twelve years. By the lease, which did not refer to the deed of settlement, the rent was reserved to S., his heirs and assigns; and it contained a covenant by the lessee to repair a blacksmith's shop, and all the glass and leadwork of the windows of the messuages, and all doors &c., the lessee being allowed sufficient bricks, &c., for the repairs, and to yield up the premises so repaired at the end of the term to S., his heirs or assigns: there was also a covenant by S. that he would repair all the messuages, houses, out-houses, edifices, and buildings, except in respect of repairs therein-before covenanted to be done by the defendant. S. died before the expiration of the term. In an action by the trustees against the lessee for a breach of the covenants of the lease, in not repairing the premises,—

Held, that the lease was not in pursuance of the power, and void as between the trustees and the lessee: first, because the condition as to the rent being reserved incident to the immediate reversion was not performed, for the rent was made payable to "S., his heirs and assigns," and S. had no legal reversion: secondly, because the lease contained an implied exemption from punishment for permissive waste.

Such a lease is good by way of estoppel between the parties to it, and consequently S. might have maintained an action upon it against the lessees for a breach of covenant by them.

The declaration recited the deed creating the power, the lease and the entry of the lessee under the demise,

and that he occupied and enjoyed the premises under the lease to the expiration of the term, and alleged as a breach, the leaving the premises out of repair at the end of the term.

Held, that, although the defendant did not by his pleadings deny that he had occupied the premises, yet, that, inasmuch as the declaration was framed substantially upon the lease, the action failed. *Yellowdy v. Gower*, 274

PRACTICE.

See AMENDMENT, (1), (2).

COMMON LAW PROCEDURE ACTS, (1), (2), (3), (7), (9).

COSTS.

JUDGMENT.

SUMMARY PROCEDURE ON BILLS OF EXCHANGE ACT.

On Application by Defendant to stay Proceedings.

On an application by a defendant, to stay proceedings, on the ground that the plaintiff's attorney is going on with the suit contrary to the express direction of his client, the plaintiff should be made a party to the rule. *Thatcher v. D'Aguilar*, 436

PREScription ACT.
(2 & 3 WILL. 4, c. 71).

See CUSTOM OF LONDON.
GAME.

PRIVY COUNCIL.

See DEBT.

PROHIBITION.

See COUNTY COURT, (2).

PROMISSORY NOTE.

See BANKING COPARTNERSHIP.

RACE

Right to recover back Deposit.

The defendant was stakeholder of a race, which was to be decided by the award of four stewards. After the race was over the stewards met, but were unable to agree, two being in favour of the plaintiff's horse, and two in favour of another horse. In an action by the plaintiff to recover the stakes—*Held*, that it was a condition precedent, that there should be a decision of the stewards, if practicable; and that the plaintiff could not submit the question to the jury, or recover back his amount of contribution. *Brown v. Overbury*,

715

RAILWAY COMPANY.

See CARRIER, (1), (3).

RAMSGATE HARBOUR ACT.

(32 GEO. 3, c. 74).

Toll—Coasting Vessel—Statute of Limitation.

The 32 Geo. 3, c. 74, s. 8, imposes certain rates and duties "to be paid by the master or owners" for every ship or vessel of a certain burthen passing from, to, or by Ramsgate. Sect. 14 declares that "no coasting vessel or fisherman shall pay the duty charged by that Act oftener than once in any one year." Sect. 15 empowers the collectors to distrain every ship, and all the tackle, &c., for nonpayment of the duties. By sect. 16, if any master or owner of any ship or vessel shall elude or avoid payment of the duties, he shall stand charged and be liable to the payment of the same; and the same shall be levied and recovered from such master or owner by the same method by which fines and penalties

imposed by that Act are levied and recovered. By sect. 72, penalties and forfeitures are to be recovered by action or distress. The defendant, who was sued for duties under the above Act, was the owner of a vessel which several times in the year sailed in ballast to Jersey, and brought from thence oysters, which the defendant purchased of fishermen there, and which he deposited in beds at Milton:—*Held*, first, that an action would lie on the statute for the recovery of the duties, and that the power of distress was merely a cumulative remedy; secondly, that the plaintiff's vessel was not a "coasting vessel" or "fisherman" within the meaning of the above Act; thirdly, that, the action being on a specialty, the period of limitation was twenty years, under the 3 & 4 Will. 4, c. 42, s. 3. *Shepherd v. Hills*, 55

RELEASE

Declaration on a guarantee by defendant for payment of goods supplied by the plaintiffs to J. Plea, that, after J. became indebted to the plaintiffs, J. being also indebted to other persons, by an indenture between J. of the first part; E and B. (one of the plaintiffs), trustees for themselves and the rest of the creditors, of the second part; and the several other persons whose names and seals were thereunto subscribed and set, being creditors of J., of the third part; after reciting that J. was indebted to the parties thereto of the second and third parts, in the several sums set opposite to their names in the schedule thereunder written, which he was unable to pay in full: it was witnessed, that J. assigned all his estate and effects to the said trustees, upon trust to pay, rateably and without preference to themselves and their

RENTCHARGE

partners, and the parties thereto of the third part, the sums set opposite their names in the schedule; and in consideration of the assignment, the several creditors, parties thereto of the second and third parts, released J. from all debts which they or their partners might have against J. up to the date thereof. Replication on equitable grounds: that B. executed the deed in his character of trustee, and not in his character of creditor, and that he did so merely for the purpose of declaring the trusts of the deed, and not with any intention of releasing the debt; that he did not sign or seal the schedule, nor was the debt of the plaintiffs contained therein; and that, if the deed operated in law as a release, it was executed by mistake, and in ignorance that such would be its legal effect. On demurrer to the replication,—*Held*, first, that, the release being general in its terms, the execution of the deed by B. operated as an extinguishment of the debt due to the plaintiffs. Secondly, that the facts disclosed by the replication did not afford any answer to the plea on equitable grounds. *Teede v. Johnson*, 842

RENT.

See POWER.

RENTCHARGE.

See DEVISE, (1).
POWER.

REPLICATION ON EQUITABLE GROUNDS.

See COMMON LAW PROCEDURE ACTS, (6).

MORTGAGE
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RESTRAINT OF TRADE.

See AGREEMENT.

REVERSION.

See LESSOR AND LESSEE.

SALE

See BANKRUPT, (4).
EXECUTION, (1).

SALE OF OFFICE.

See BOND, (1).

SCIRE FACIAS.

See COMPANIES CLAUSES CONSOLIDATION ACT, 1845.

SEAWORTHINESS.

See CHARTERPARTY, (2).

SERVANT.

See SUB-CONTRACT.

SETTLEMENT.

See POWER.

Priority of Terms created by Power.

By a marriage settlement, estates were limited to A. for life, with remainder to trustees for 600 years, to be computed from the decease of A., in trust, to raise portions for younger children, with remainder to his first and other sons successively in tail. Power was given to A. to create a rent-charge in favour of any second wife, and to grant the estate for a term of years, to take effect immediately after his decease, for the purpose of securing it :—*Held*,

that the term of 100 years, created in pursuance of this power, was not concurrent with, but took priority over the term of 600 years; and that the person in whom the term of 100 years was vested might sue alone, without joining the trustee of the term of 600 years. *Bailey v. Tennant*, 776

SET-OFF.

In Action by Administrator.

To an action by an administrator who sues in his representative character for a debt due after the death of the intestate, the defendant cannot set off a debt due to him from the intestate in his lifetime. So *held* in the Exchequer Chamber, affirming the judgment of the Court of Exchequer. *Rees v. Watts*, 410

SHERIFF.

See EXECUTION, (1).

INTERPLEADER ACT, (1), (2).

Seizure of Bedding and other excepted Articles of Insolvent Debtor.

No action will lie against a sheriff for taking in execution under a writ of *fi. fa.* the bedding and other excepted articles of an insolvent debtor, who has petitioned under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96; but if the goods are protected from seizure (and *semble*, they are), the remedy is by application to the Court for an order on the sheriff to restore them. *Bideal v. Fort*, 847

SHIPOWNER.

See CARRIER, (4).*Liability for Necessaries supplied to the Ship.*

The fact of a person being the re-

SPECIFICATION.

gistered owner of a ship is not of itself evidence that the master has authority to bind him by contracts for necessaries supplied to the ship; but it must be shewn that the master is his agent for that purpose.

Therefore, where a ship sailed for a foreign port, the master having a power of attorney from the owner, and whilst the ship was at the port, the defendant purchased it:—*Held*, that he did not thereby become liable for necessaries supplied to the ship by order of the master. *MacKenzie v. Pooley*, 638

SOLICITOR.

See AGREEMENT.

SON ASSAULT DEMESNE.

See PLEADING, (3).

SPECIAL JURY.

Certificate.

A cause was tried by a special jury at the Spring Assizes, 1855, and a verdict found for the defendant. The defendant's counsel then asked the Judge to certify for the special jury, and he consented; but the associate omitted to indorse the certificate on the record. In the following Term, a rule nisi was obtained for a new trial, which was not disposed of until Trinity Vacation. On taxation of costs it was discovered that the certificate was not indorsed on the record, and on application to the Judge on the 14th of August, he signed the certificate:—*Held*, that the certificate was too late, and the Court set it aside. *Leach v. Lamb*, 437

SPECIFICATION.

See PATENT.

STAKEHOLDER.

See RACE.

STAMP.

(1). *Contract relating to Sale of Goods.*

The following agreement was held to be a contract relating to the sale of goods within the exemption in the Stamp Act, 55 Geo. 3, c. 184, Sched. Pt. I. tit. "Agreement:" "I do agree to take all the manure at fourpence each horse, a week, for forty-five horses by the year, and to keep it cleared away every week; and likewise to let the few gardeners have a few loads at the same price, and serve them; and to let me have during year sixty loads of straw, at 1*l.* 9*s.* per load: begun the year 23rd of July, 1853, and ends 23rd of July, 1855." *Gurr v. Soudds*, 190

(2). *Pledge.*

The following instrument was held not to require a mortgage stamp:—"I have this day deposited with A. the following goods, viz tea and coffee set, &c., to be held by him as a security for the payment of 160*l.*, this day lent to me, together with interest; and should such sum of 160*l.* not be paid by me to A. by the 25th of March next, I hereby authorise and empower him to sell and dispose of the said articles, and out of the proceeds thereof to pay the expenses of the sale, and retain the said sum of 160*l.* and interest thereon. *In Re Attenborough*, 461

(3). *Conveyance of Land abroad.*

A conveyance executed in England upon a sale of land in Australia requires an ad valorem stamp. *In Re Wright*, 458

STATUTE OF LIMITATIONS.

See PLEADING, (2).

RAMEGATE HARBOUR ACT.

STAYING PROCEEDINGS.

See COMMON LAW PROCEDURE ACTS, (8).

INTERPLEADER ACT, (2).

PRACTICE.

WINDING-UP ACT, 1.

SUB-CONTRACT.

Liability of general Contractor for Injury caused by Negligence of Servant of Sub-contractor.

The defendants, having contracted with the Crystal Palace Company to erect a tower, manufactured the materials, and made a sub-contract with M. and other persons to do by "piece work" particular portions of the hoisting and fixing the materials, the scaffolding and tools being provided by the defendants. The workmen employed by the sub-contractors were paid weekly by the defendants according to the time they worked, an account of which was kept by the defendants' foreman. M., the sub-contractor, employed W., the plaintiff's husband; and whilst he was at work at the bottom of the tower, the defendants' men, who were at work at the top, negligently let fall an instrument called a "rymer," which struck the plaintiff's husband on the head, and caused his death:—*Held*, that the sub-contractor and his workmen were servants of the defendants, engaged in one common employment with their other servants, and, consequently, that the defendants were not liable under the 9 & 10 Vict. c. 93, for the injury caused by the negligence of the latter. *Sarah Wiggett v. Fox & Henderson*, 832

SUCCESSION DUTY ACT, 1853.

(16 & 17 VICT. c. 51.)

(1). *Duty, how chargeable.*

A testator, by his will, bequeathed certain annuities, and died on the 21st of May, 1852.

On the 19th of May, 1853, and before the duty on the annuities was calculated, the Succession Duty Act, 1853, came into operation:—*Held*, that the duty was chargeable under the Legacy Duty Act, 36 Geo. 3, c. 52, and not under the Succession Duty Act. *In Re Earl of Cornwallis*, 580

(2). *Allowance in respect of Loss of Annuity.*

A., by settlement on the marriage of his daughter with B., covenanted to pay them 500*l.* a year during their lives, provided that, if B., by reason of the death of his brother without issue, should come into possession of certain estates, the covenant should cease, determine, and be void. In 1853, B.'s brother died without issue, and B. came into possession of the estates:—*Held*, on appeal against the decision of the Commissioners of Inland Revenue, that, in assessing the duty chargeable under The Succession Duty Act, 1853, B. was entitled, under the 38th section of that Act, to an allowance in respect of the loss of the annuity. *In Re Micklethwait*, 452

SULPHURIC ACID.

See CARRIER, (4).

SUMMARY PROCEDURE ON
BILLS OF EXCHANGE ACT.

(18 & 19 VICT. c. 67.)

Form of Indorsement on Writ.

The form of indorsement pre-

scribed by the Summary Procedure on Bills of Exchange Act, 18 & 19 Vict. c. 67, may be altered, by inserting a claim for costs, and the blank before "days" may be filled up with "four."

An application to set aside a writ of summons issued under that Act, for irregularity, is not too late if made within the time limited for obtaining an order to appear. *Robinson v. Cotterell*, 476

SUMMING UP EVIDENCE

See COMMON LAW PROCEDURE ACT, (9).

SURETY.

See BOND, (2).

TERM.

See POWER.

TOLL.

See GRAND JUNCTION CANAL COMPANY.

RAMSGATE HARBOUR ACT.

TREASURER OF POOR LAW
UNION.

See BOND, (2).

TRESPASS.

See COPYHOLD.

TROVER.

Possessory Title.

The plaintiff, under the license of the owner of the soil to search for tin ore, had, in searching for that mineral, made certain excavations in the soil. The defendant carted away some of the soil which the the plaintiff had so thrown out,—

the plaintiff not having abandoned his right to search the soil thrown out for ore. In an action of trover for the removal of the soil:—*Held*, that the plaintiff had, as against the defendant, a mere wrongdoer, a sufficient possessory title to the mass thrown out, to enable him to maintain the action. *Northam v. Bowden*,

70

TRUSTEE.

See MARYPORT HARBOUR ACT.

POWER.

RELEASE.

VENDOR AND VENDEE.

(1). *Custom to give Notice to Broker.*

The defendant, a London merchant, employed a broker at Liverpool to purchase some wool. The broker negotiated a sale by the plaintiff to the defendant of certain bales deliverable at Odessa, "the names of the vessels to be declared as soon as the wools were shipped." In this transaction the broker acted for both plaintiff and defendant. By the custom of Liverpool, where a contract contained a stipulation that notice of an event should be given by the vendor to the vendee, it was usual for the vendor to give the notice to the broker, who communicated it to the vendee:—*Held*, that the defendant was bound by such usage, and therefore that a notice by the plaintiff to the broker of the names of the vessels in which the wools were shipped was a performance of that stipulation, although the broker omitted to communicate them to the vendee. *Groaves v. Legg*,

642

(2). *Title of Vendee to Goods obtained by False Representations.*

Where a vendee obtains possession of a chattel, with the intention of the vendor to transfer both the

property and possession; although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract or obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction; and, consequently, if, before the disaffirmance, the vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transferee is good against the vendor.

Therefore, where A. falsely and fraudulently represented to the plaintiffs that he was authorised by and acting on behalf of V. N. & Co. in the purchase of certain goods, and the plaintiffs, in consequence of such false and fraudulent representation, delivered the goods to A. with intent to transfer to him the property in them, and A. pledged the goods with the defendant for a *bonâ fide* advance:—*Held*, that the plaintiffs could not maintain an action for the goods, until they had paid or tendered to the defendant his demand. *Kingsford v. Merry*,

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WAR.

See ALIEN ENEMY.

WASTE.

See LANDLORD AND TENANT, (1).
POWER.

WATERCOURSE.

Right to Surface Water.

1. The owner of land has an unqualified right to drain it for agricultural purposes, in order to get rid of mere surface water, the supply of the water being casual and its flow following no regular or definite course; and a neighbouring pro-

prietor cannot complain that he is thereby deprived of such water which otherwise would have come to his land.

The land of the plaintiff and defendant was contiguous, and on the outside of the defendant's land, and near to it, was a wet springy spot, where at most seasons of the year some water rose to the surface, and collected in sufficient quantity to flow down the slope of the land. In times of wet a great body of water flowed down, and after a long drought there was hardly any, and sometimes none. There was no regularly formed ditch or channel for the water, the place where it flowed being constantly trodden in by cattle. The water which was not absorbed (and, except in times of drought, all of it was not absorbed) ran into an old watercourse of the plaintiff, which led into a reservoir of the plaintiff. The water had so flowed for upwards of twenty years. The defendant, for the purpose of draining his land, and of supplying some part of his property with water, diverted this water from the plaintiff's reservoir.

At another spot on the plaintiff's land, as long ago as any one could recollect, water had always risen to the surface. There had generally been a drinking place for cattle formed with stones, and the overflow of the water went down a ditch, and thence into a watercourse to the plaintiff's reservoir:—*Held*, that the defendant was not liable to the plaintiff for having deprived him of the use of such waters, he having diverted them by draining his land, for the purpose of getting rid of the water, and of supplying another portion of his property with it.

For upwards of twenty years water had flowed through an old drain on the defendant's land, and along an ancient watercourse, and thence

along a close of the defendant, called G. B., and had thence contributed to supply the plaintiff's mills after their erection in 1845. In that year the defendant by deed conveyed to the plaintiff the close G. B., "together with all ways, watercourses, liberties, privileges, rights, members, and appurtenances to the same close belonging or appertaining," subject to the proviso, that it should be lawful for the defendant to use, for any manufacturing, domestic, or agricultural purposes, any water flowing from or through the contiguous lands of the defendant unto and into the close G. B., returning the surplus, or so much as remained, after being used for the purposes aforesaid, into its usual channel at a certain point, so that the water should not be diverted from its then course, but be allowed to flow into the close G. B. The defendant erected a lock-up-tank upon his land, and caused the water which arose on his land near to the close G. B., and which had previously been accustomed to flow along the old drain and ancient watercourse into the close G. B., and he caused the water to be conveyed from the tank to a lower part of his land, to be used by his tenants. This water was used by them for the purposes mentioned in the proviso to the deed, but the surplus could not be returned to the close G. B.

Held, that by the deed the defendant granted to the plaintiff the use of the water, subject only to the use by himself of it as specified in the proviso; and that, by locking it up, he had diverted it, and was liable to an action for a breach of his covenant, by reason of such diversion. *Raustron v. Taylor*, 369

2. A landowner has a right to appropriate surface water which flows over his land in no definite channel, although the water is thereby pre-

WEIGHTS AND MEASURES.

vented from reaching a watercourse which it previously supplied.

Therefore, where the plaintiff's mill, for more than fifty years, had been worked by the stream of a brook, which was supplied by the water of a pond filled by rain, a shallow well supplied by subterraneous water, a swamp, and a well formed by a stream springing out of the side of a hill, the waters of all which occasionally overflowed and ran down the defendant's land in no definite channel into the brook:—

Held, that the plaintiff had no right, as against the defendant, to the natural flow of any of the waters.

Broadbent v. Ramsbotham, 602

WATER COMPANY.

Liability for Escape of Water.

A water company having observed the directions of the Act of Parliament in laying down their pipes, is not responsible for an escape of water from them not caused by their own negligence.

The fact, that their precautions proved insufficient against the effects of a winter of extreme coldness, such as no man could have foreseen, is not sufficient to render them liable for negligence.

Fire-plugs properly constructed having been inserted as safety-valves in these pipes, in pursuance of their Act:—*Semble*, per *Bramwell*, B., that the company are not liable for not removing accumulations of ice in the streets over such plugs. *Blyth v. The Company of Proprietors of the Birmingham Waterworks*, 781

WEIGHTS AND MEASURES.

Long Weight.

A contract for the sale of a certain number of tons of iron, "long

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weight," is not in contravention of the statutes 5 & 6 Will. 4, c. 63, and 5 Geo. 4, c. 74, and consequently such contract is valid. So *held* in the Exchequer Chamber (affirming the judgment of the Court of Exchequer).

Semble, that the 15th section of the 5 Geo. 4, c. 74, is not repealed by the 5 & 6 Will. 4, c. 63; and consequently, that *contracts* by local weight may be lawfully made, if the proportion to the standard is expressed; though it is otherwise with respect to *measures*, all local measures being abolished by the 6th section of the 5 & 6 Will. 4, c. 63. *Giles v. Jones*, 393

WESTMINSTER IMPROVEMENT COMMISSIONERS.

See COMMON LAW PROCEDURE ACTS, (4), 2.

WILL.

See DEVISE.

WINDING-UP ACT.

(11 & 12 VICT. c. 45).

Action against Official Manager.

1. An order having been made under the 11 & 12 Vict. c. 45, for winding up the affairs of a Joint Stock Company, a claimant exhibited proof of a debt before the Master by affidavit, which he considered unsatisfactory, and required the attendance of the claimant, to be examined *viva voce*. The claimant did not attend, but brought an action for his claim against the official manager:—*Held*, that it was not competent for him to proceed by action, and the Court stayed the proceedings. *Hutchinson v. Harding*, 561

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2. The 50th section of the Winding-up Act, 11 & 12 Vict. c. 45, which requires actions to be brought against the official manager of the company, does not apply to a Joint Stock Company provisionally registered. *Russell v. Croyedhill*, 123

WRIT OF SUMMONS.

WRIT.

See SUMMARY PROCEDURE ON BILLS
OF EXCHANGE ACT.

WRIT OF SUMMONS.

See COMMON LAW PROCEDURE
ACTS, (1).

END OF VOL. XI.

LONDON:
PRINTED BY WILLIAM TYLER,
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